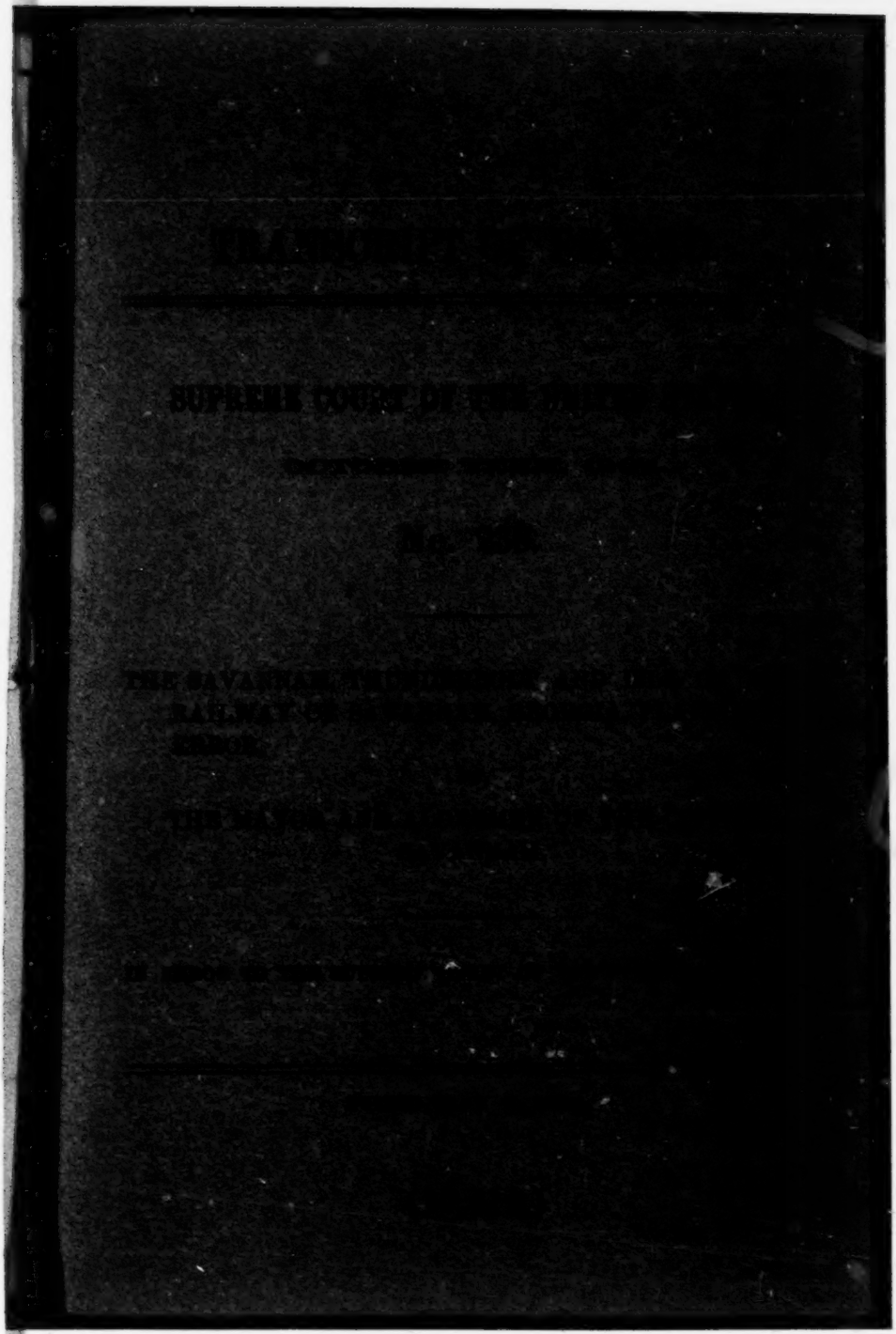

(19,318.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 238.

THE SAVANNAH, THUNDERBOLT AND ISLE OF HOPE RAILWAY OF SAVANNAH, GEORGIA, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1904.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Ga., Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the State of Georgia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, plaintiff, and The Mayor and Aldermen of the City of Savannah, defendant, wherein was drawn in question the validity of an authority exercised under said State, on the ground of its being repugnant to the Constitution of the United States and the decision being in favor of such validity, and wherein was drawn in question the construction of clauses of the Constitution of the United States and the decision was against the right or exemption specially set up or claimed under such clauses of the Constitution, a manifest error hath happened, to the great damage of the said The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, plaintiff, in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have same at Washington within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according
2 to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of April in the year of our Lord one thousand nine hundred and four.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the Circuit Court of the United States for the Northern District of Georgia.

Allowed by
T. J. SIMMONS,
Chief Justice Supreme Court of Ga.

Filed in office April 1st 1904.

Z. D. HARRISON,
Clk S. C. Ga.

3 UNITED STATES OF AMERICA,
Fifth Circuit, Southern District of Georgia, Eastern Division.

To the Mayor and Aldermen of the City of Savannah:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas J. Simmons, chief justice of the supreme court of the State of Georgia, this first day of April in the year of our Lord one thousand nine hundred and four.

T. J. SIMMONS,
Chief Justice Supreme Court of Georgia.

Due and legal service of the foregoing citation acknowledged this —— —, 1903.

——— ———,
Att'y of Def't in Error.

4 [Endorsed:] In the supreme court of Georgia, March term, 1904. The Savannah Thunderbolt and Isle of Hope R'w'y of Savannah Ga. *vs.* The Mayor & Aldermen of Savannah. Citation. Filed in office April 12, 1904. Logan Bleckley D. C. S. C. Ga. David C. Barrow, att'y for pl't'ff in error.

STATE OF GEORGIA,
County of Chatham.

On this 5th day of April 1904 personally appeared before me, a notary public in and for said county, David C. Barrow, and made oath that he delivered a copy of within citation, and a copy of the writ of error therein named, to William Garrord, whom deponent says is the attorney at law for The Mayor and Aldermen of Savannah, Ga.

DAVID C. BARROW.

Sworn to and subscribed before me on this 11th day of April, 1904.

T. LLOYD OWENS,
Notary Pub., Chat. Co., Ga.

GEORGIA, }
Chatham Co. }

On this 11th day of April 1904 personally appeared before me, a notary public in and for said county, David C. Barrow, and made oath that be delivered a copy of within citation to Herman Myers, mayor, of the city of Savannah, Ga.

DAVID C. BARROW.

Sworn to and subscribed before me

[Seal of T. Lloyd Owens, Notary Public, Chatham Co., Ga.]

T. LLOYD OWENS,
Notary Public, Chat. Co., Ga.

5 In the Supreme Court of the State of Ga.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY of Savannah, Georgia,
v.
THE MAYOR AND ALDERMEN OF SAVANNAH. } Injunction.

To the Honorable Thomas J. Simmons, chief justice of the State of Georgia:

And now comes The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, the plaintiff in error in the above entitled case and says that on or about, the 2nd day of April, 1902, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

The said supreme court of the State of Georgia is the highest court of the State of Georgia in which a decision in said suit can be made, and said judgment so rendered was against this plaintiff, and was a final judgment in said cause.

In said cause and in the judgment of the said supreme court of the State of Georgia there was drawn in question the validity of an authority exercised under the State of Georgia on the grounds of its being repugnant to the Constitution of the United States and the decision was in favor of such validity, and there was drawn in question the construction of clauses of the Constitution of the United States and the decision was against the right or exemption specially set up or claimed under such clause- of the said Constitution, and manifest error hath happened, to the great damage of the said The Savannah, Thunderbolt & Isle of Hope Railway of Savannah,

6 Georgia, plaintiff in error.

Wherefore, this plaintiff prays for the allowance of a writ of

error from the Supreme Court of the United States to the supreme court of the State of Georgia, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said the Supreme Court of the United States.

DAVID C. BARROW,
Attorney for the S., T. & I. of H. R'y of Savannah, Georgia.

—— ——, *Of Counsel.*

Filed in office Ap'l 1, 1904.

Z. D. HARRISON,
C. S. C. Ga.

7 UNITED STATES OF AMERICA,
Fifth Circuit, Southern District of Georgia,
Eastern Division.

Know all men by these presents that we, the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, as principal, and Henry Parsons, as surety, are held and firmly bound unto the Mayor and Aldermen of the City of Savannah in the full and just sum of four thousand dollars ($4,000.00), to be paid to the said Mayor and Aldermen of the City of Savannah, its certain attorney, successors or assigns; to which payment well and truly — be made, we bind ourselves and our successors jointly and severally by these presents:

Sealed with our seals and dated at Savannah, Georgia, this 30th day of March, 1904.

Whereas lately at a term of the supreme court of the State of Georgia, in a suit depending in said court between The Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, plaintiff, and The Mayor and Aldermen of the City of Savannah, defendant, a judgment was rendered against the said The Savannah, Thunderbolt and Isle of Hope Railway of Savannah; and the said The Savannah, Thunderbolt and Isle of Hope Railway of Savannah, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said The Mayor and Aldermen of the City of Savannah, citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The Savannah, Thunderbolt and Isle of Hope Railway of Savannah shall prosecute its writ of error to effect and shall answer all dam-

ages and costs if they fail to make their plea good, then the
8 above obligation to be void, else to remain in full force and virtue.

SAVANNAH, THUNDERBOLT AND ISLE OF HOPE R. R.,
By G. W. J. BALDWIN, [L. S.]
President, Principal.
HENRY PARSONS, *Surety.* [L. S.]

Signed and sealed in the presence of
RAIFORD FALLIGANT,
[SEAL.] *Notary Public, Chatham County, Georgia.*

UNITED STATES OF AMERICA,
Fifth Circuit, Southern District of Georgia,
Eastern Division.

Personally appeared Henry Parsons, who being duly sworn says that he is worth four thousand ($4000.00) dollars over and above all just debts and liabilities and exemptions.

HENRY PARSONS.

Sworn to and subscribed before me this thirtieth day of March, 1904.

RAIFORD FALLIGANT,
Notary Public, Chatham County, Georgia.

Approved:
T. J. SIMMONS,
Chief Justice Supreme Court of Ga.

Filed in office Ap'l 1, 1904.
Z. D. HARRISON, *C. S. C., Ga.*

9 In the Supreme Court of the State of Georgia.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY of Savannah, Georgia,
v.
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH. } In Equity.

And now comes the plaintiff in error, The Savannah, Thunderbolt and Isle of Hope Railway, of Savannah, Georgia, and files, in connection with its petition for a writ of error the following assignments of error which it intends to urge:

1. The court erred in sustaining said tax ordinance for the reason that said tax ordinance is repugnant to the fourteenth amendment

of the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws, by being an arbitrary classification by the taxing power and being a discrimination against the said plaintiff, in that it did not apply to other persons similarly situated and using the streets under like conditions.

2. The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it was void, because it impaired the obligation of the contract between the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, and the mayor and aldermen of the city of Savannah made November 4th, 1897, and amended in April and July, 1898, set forth in the record.

3. The court erred in refusing to hold and decide that the said tax ordinance of the mayor and aldermen of the city of Savannah was an authority exercised under the State of Georgia and was void upon the ground that it was repugnant to that clause of the Constitution of the United States which prohibits any State from impairing the obligation of a contract.

4. The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it included Whitaker
10 and Bolton streets, the land for which had in part been conveyed to the mayor and aldermen by the railway for the purposes of streets, and at the same time the easement for railroad purposes over said land was expressly reserved to the railway, this being done by contract with the mayor and aldermen, the obligation of which contract the plaintiff contends the ordinance impairs.

5. The court erred in refusing to enjoin the enforcement of said tax ordinance notwithstanding the objection that there was no law in the State of Georgia which authorized the municipal government of a city to levy any license tax or business tax upon a railroad company, nor to compel a railroad company to pay for the privilege of doing business, said ordinance for this reason being an attempt to take the plaintiff's property without due process of law and thereby in violation of the Constitution of the United States.

DAVID C. BARROW,
Attorney for Plaintiff in Error.

Filed in office Ap'l 1, 1904.

Z. D. HARRISON, *C. S. C., Ga.*

11 GEORGIA,
Chatham County.

Be it remembered that on July 12th, 1901, there came on to be tried in the superior court of said State and county, before his honor, Robert Falligant, the judge of said court then and there presiding and a jury duly empaneled for that purpose, the case of The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, *v.* The Mayor and Aldermen of Savannah. After the evidence was all

submitted, the judge charged the jury to find a verdict for the defendant, the charge being simply and only an express instruction to the jury to find a verdict for the defendant. The jury accordingly found a verdict for the defendant. Thereupon a decree was entered.

Afterwards, to wit, on July 19th, 1901, during the same term of the court at which said verdict was found and said decree entered and within thirty (30) days from the date of said verdict and decree the said plaintiff, The Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Ga., filed its motion for a new trial in said case, and on July 20th, 1901, duly and legally filed its brief of evidence in said case within thirty (30) days from the date of said verdict and decree. The brief of evidence was duly and legally approved by the judge. The grounds of the motion for a new trial were duly and legally approved by the judge.

On August 10th, 1901, during the same term of the court, the said motion for a new trial came on regularly to be heard before the judge in its order, and on said date last mentioned was heard and determined and a new trial refused.

To this order and judgment of the court refusing a new trial the Savannah, Thunderbolt & Isle of Hope Railway of Savannah then and there excepted, and now excepts and assigns the same as error upon the following grounds: First. The court erred in overruling the first ground of the motion for a new trial, which is, that the verdict is without evidence to support it. Second. The court erred in overruling the second ground of the motion for a new trial,
12 which is, that the verdict is contrary to law. Third. The court erred in overruling the third ground of the motion for a new trial, which is, that the court erred in instructing a verdict for the defendant. Fourth. The court erred in overruling the fourth ground of the motion for a new trial, which is, that said verdict and decree for the defendant are erroneous for the reason that the evidence showed that other railroads using the streets of Savannah, by permission from council, for local business, and carrying on therein a strictly local business, were not taxed on their business and were not charged anything for the privilege of using the streets; the evidence thus making it clear that the said ordinance was not uniform on all individuals of the same class, and was consequently a void ordinance, denying to the plaintiff the equal protection of the laws and being violative of the 14th amendment to the Constitution of the United States. Fifth. The court erred in overruling the fifth ground of the motion for a new trial, which is, that the said verdict and judgment are erroneous for the reason that the evidence showed that a contract existed between the said railway and the said city of Savannah, by which the privilege of using the streets of Savannah was granted by the city to the railway and paid for by the railway, and this ordinance is an impairment of the obligation of that contract, in that, it seeks to compel the said railway to pay for the privilege of using the same streets which it had already bought and paid for. Sixth. The court erred in overruling the sixth ground of

the motion for a new trial, which is, that the said verdict and judgment are erroneous for the reason that Whitaker and Bolton streets are included in the mileage which is charged for, while the evidence shows that a portion of Whitaker and Bolton streets were conveyed to the city by the railway and the right to the use for railway purposes reserved. Seventh. The court erred in overruling the seventh ground of the motion for a new trial, which is, that the said verdict and decree are erroneous for the reason that there is no law in the State of Georgia which authorizes the municipal government of any city to levy any license tax or business tax upon a railroad company of any kind nor to compel a railroad company of any kind to pay for the privilege of doing business in said city; said ordinance for this reason being void as an attempt to take the plaintiff's property without due process of law and being repugnant to the 14th amendment of the Constitution of the United States.

13

And the said Savannah, Thunderbolt & Isle of Hope Railway assigns error upon each of the above grounds.

The Savannah, Thunderbolt & Isle of Hope Railway specifies as material to a clear understanding of the errors complained of: First. The original petition of the plaintiff and the two amendments thereto. Second. The answer of the defendant to the rule to show cause. Third. The answer of the defendant to the petition, and amendment thereto. Fourth. The order of the judge refusing to grant an injunction. Fifth. The verdict of the jury and the decree of the court thereon. Sixth. The motion for a new trial and the rule *nisi* and entries thereon. Seventh. The order and judgment of the court refusing to grant a new trial. Eighth. The brief of evidence accompanying the motion for a new trial, with all the entries thereon.

And now within thirty (30) days from the date of the decision complained of comes The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, the plaintiff in error, and tenders this its bill of exceptions, and prays that the same may be certified in accordance with the statute, in order that the errors complained of may be corrected.

BARROW & BARROW,
Savannah, Georgia, Attorneys for S., T. & I. of H. Ry.

I do certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Chatham county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the proper term of the supreme court, that the errors alleged to have been committed may be considered and corrected.

14

Savannah, Ga., August 14, 1901.

R. FALLIGANT,
Judge E. J. C. of Georgia.

GEORGIA,
Chatham County.

Clerk's Office, Superior Court.

I, James K. P. Carr, clerk of said superior court, do hereby certify this instrument in typewriting and writing, to be the true original bill of exceptions filed in this office in said case of "The Savannah, Thunderbolt & Isle of Hope Railway of Savannah *versus* The Mayor and Aldermen of Savannah," a copy of which bill of exceptions remains on file in this office.

In testimony whereof, I have hereunto set my official signature and affixed the seal of said court this 24 day of August, 1901.

[SEAL.] JAMES K. P. CARR,
Clerk Superior Court, Chatham County, Geo.

Due and legal service of the within bill of exceptions and certificate of the judge acknowledged, this August fourteenth, 1901,

SAMUEL B. ADAMS,
Att'y for Def't in Error.

Savannah, Ga.

Indorsed on back: No. 14 eastern. In the supreme court of Georgia. October term, 1901. The Savannah, Thunderbolt & Isle of Hope Railway of Savannah *vs.* The Mayor and Aldermen of Savannah. Original bill of exceptions. Filed in office August 15, 1901. James K. P. Carr, clerk S. C. C. C. Filed in office August 26, 1901. Logan Bleckley, D. C. S. C. Ga.

15 *Transcript of the Record.*

GEORGIA,
Chatham County.

To the superior court of said county:

The petition of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., respectfully showeth:

First. That your petitioner is a railroad corporation, chartered under the laws of the State of Georgia, having its principal office and place of business in the city of Savannah, said State and county, and carrying on the business of a common carrier of freight and passengers over its line of railroad, and located in said State and county and operated by electricity. Part of its line of road is in the city of Savannah and part is within the open country.

Second. That in December, 1893, the municipal authorities of the city of Savannah, passed an ordinance, "to assess and levy taxes and raise revenue for the city of Savannah; for the regulation of certain kinds of business in the corporate and jurisdic-

tional limits of said city, fixing penalties for the violation of the revenue ordnance of said city and for the purposes connected with the taxes and revenue of said city." By the terms of said tax ordinance the following tax was imposed, to wit: "Street railway company for each mile or fraction of a mile of track one hundred dollars. In addition thereto as part of same tax for each and every car employed by such company in the city twenty-five dollars." That under and by virtue of said tax ordinance the municipal authorities of the city of Savannah have imposed upon your petitioner a tax upon its property of nineteen hundred dollars.

Third. Your petitioner has duly and legally made its returns for State taxation, for Chatham County taxes and for taxes due the city of Savannah for the year eighteen hundred and ninety nine, through the comptroller-general's office, in accordance with law. That the returns, as required by law, cover all of petitioner's property, including the property on which the above stated tax
16 is assessed. That the returns made to the comptroller-general show the length of its track mileage in the city of Savannah, in order that the taxes due to said city might be computed, levied and collected according to law.

Fourth. The said tax of nineteen hundred dollars upon petitioner's real estate is illegal and contrary to law. It is assessed without authority of law. It is not assessed and levied according to law providing for the taxation of railroads by municipal authorities. It is not ad valorem. Your petitioner has informed the corporate authorities of the city of Savannah, that it is not liable for the tax imposed.

Fifth. Notwithstanding the fact that this exaction of nineteen hundred dollars is illegal and without any authority of law and notwithstanding the further fact that the said municipal authorities of the city of Savannah have been notified that it is illegal and that your petitioner was not liable to pay said exaction, nevertheless, in violation of law, and of your petitioner's rights, and without any authority, the said corporate authorities of the city of Savannah have issued an execution against your petitioner's property, which they have placed in the hands of the city marshal and have undertaken and are now undertaking to enforce the collection of said sum of money by seizure of petitioner's property for the purpose of sale. Unless an immediate remedy is afforded to your petitioner, it will suffer irreparable loss and damage.

Sixth. Your petitioner waives all discovery from the defendant, and, being remediless at and by the strict rules of the common law, brings to this honorable court, this its equitable petition and prays: (a.) That an injunction do issue restraining the Mayor & Aldermen of the City of Savannah, their officers, servants, agents and employees, from attempting to enforce the collection of the said sum of nineteen hundred dollars or any part thereof, hereinbefore referred to, and commanding them to desist from further attempts to collect any so-

called taxes from your petitioner under said illegal ordinance.
17 (*b.*) That your petitioner may have such other and further relief as the nature of the case may require. (*c.*) That process do issue requiring the said Mayor and Aldermen of the City of Savannah to be and appear at the next term of the superior court, in and for said county, then and there to answer your petitioner's complaint.

BARROW & OSBORNE,
Att'ys for Petitioners.

GEORGIA, }
Chatham County. }

Before me personally came H. M. Lofton, who on oath says that he is the general manager of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., and that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

H. M. LOFTON,
Gen. Mgr. S., T. & I. of H. Ry.

Sworn to and subscribed before me this 19th day of August, 1899.

A. L. ALEXANDER,
Notary Public, Chat. Co., Ga.

GEORGIA, }
Chatham County. }

In the Superior Court of said County.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RWY. vs. MAYOR & ALDERMEN OF SAVANNAH. } In Equity. Petition for Injunction & Restraining Order.

Upon reading and considering the foregoing petition, it is ordered that the same be filed and that the Mayor and Aldermen of the City of Savannah, their officers, servants, agents and employees be and they are hereby temporarily restrained and prohibited from enforcing or further proceeding with the collection of the said sum of nineteen hundred dollars assessed as taxes and any further attempts to collect taxes, and that they do show cause before me at the court house of Chatham county on the 28th day of October, 1899, at 10 o'clock a. m., why the temporary injunction prayed for should not be granted. That the said defendant be served with a copy of the petition and order and rule *nisi*. This 19th day of August, 1899.

R. FALLIGANT,
Judge E. J. C. of Geo.

18 STATE OF GEORGIA,
Chatham County.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RY.
vs.
MAYOR & ALDERMEN CITY OF SAVANNAH.

To the sheriff of the county of Chatham or his legal advisers:

The defendant, Mayor & Ald'n of Savannah, is hereby required personally or by an attorney to be and appear at the next term of the superior court of Chatham Co. to be holden in and for said county on the 4th day in December next, then and there to answer the plaintiff's complaint, as in default thereof the court will proceed as to justice shall appertain.

Witness the Honorable R. Falligant, judge of said court. This the 19 day of August, 1899.

JAMES K. P. CARR, *Clerk.*

By consent of parties, the hearing in this case is continued to Saturday, Nov. 4, 1899, and the restraining order is continued in force until the further order of the court. Oct. 28, 1899.

R. FALLIGANT, *Judge.*

Answer to Rule to Show Cause.

In Chatham Superior Court.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILway Co. of Savannah, Ga.,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Savannah.
} Injunction, etc.

And now comes the above named municipal corporation and in answer to the rule to show cause granted on the 19th day of August, 1899, shows as cause why the temporary injunction should not issue as follows:

1. Petitioner does not show any reason in his petition for the injunction prayed for or other relief.

2. It appears by the allegations in the petition in connection with the tax ordinance referred to that the execution complained of had been legally issued, is legally enforceable, and no legal reason
19 exists for any interference therewith.

3. There is no equity or other ground for relief in the petition or under the facts, as will more fully appear by reference to the demurrer filed with this answer, and also the verified answer of this defendant here to the court shown.

Wherefore defendant prays that the injunction will not be granted.

SAM'L B. ADAMS,
Att'y for Def't.

Endorsements on the back: In Chatham superior court. Sav'h Thunderbolt & Isle of Hope R. R. *vs.* Mayor, etc., of Sav'h. In equity. Answer to rule to show cause. Filed in office Oct. 28/99. J. L. Murphy, dep. clerk S. C. C. C.

Answer of Defendant to Petition.

In Chatham Superior Court.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILway Co. of Savannah, Ga.,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Savannah. } Injunction, etc.

And now comes the above named municipal corporation, the defendant in the above cause, by its attorney at law, and subject to the demurrer filed by def't., answers the petition filed in said cause as follows:

1. Defendant admits the allegations in the first paragraph of the petition to be true, but it is also true that plaintiff is commonly known as a street railroad company, and the bulk of its business and revenue is due to the use of the streets of the city of Savannah by its electric passenger street cars.

2. On the 28th day of December, 1898, this defendant, through its council, passed a tax ordinance, the title of which is correctly set forth in the second paragraph of the petition, and in this ordinance it is provided, on page 11 of the printed pamphlet
20 that "street railroad companies, whether under the control of another company, or not, shall pay one hundred (100) dollars per mile or fraction of a mile of track, and, in addition thereto, twenty-five (25) dollars on each and every car at any time used by such company in the city. It shall also be required that each and every railroad company doing business in this city shall take out badges for all cars employed by them, which badges shall be furnished by the city treasurer, and which shall be numbered. It shall furthermore be required that each and every car employed by each and every street railroad company shall have such badge as hereinbefore provided securely fastened in a conspicuous place upon the inside of such car," as will more fully appear by reference to the said tax ordinance.

That at a meeting of the council of the city of Savannah, held March 22, 1899, another ordinance was passed of which the following is a copy, to wit:

"An ordinance to amend that part of the tax ordinance passed December 28, 1898, relating to street railroad companies, to be found on page 11 of the pamphlet containing the said tax ordinance.

SECTION 1. Be it ordained by the mayor and aldermen of the city of Savannah in council assembled, "That, for the purpose of expressing more clearly the intent of council, the words, on page 11 of the pamphlet containing the above mentioned tax ordinance, 'street railroad companies, whether under the control of another company or not, shall pay one hundred dollars per mile or fraction of a mile of track,' be and the same are hereby so amended that thereafter they shall read as follows: 'Street railroad companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city and for the use of the streets of the city, at the rate of one hundred dollars per mile or fraction of a mile of track used in the city of Savannah by said railroad company, and it shall be the duty of street railroad companies to make a return under oath, through their proper official, of the amount of their trackage in the city of Savannah.' The balance of the paragraph herein referred to touching street railroad companies shall remain and read as it now is.

21 SECTION 2. Be it further ordained, That all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed."

Previous to the passage of the said tax ordinance of December 28, 1898, the plaintiff and other street railroad companies had been required to pay and had paid to the city of Savannah a specific tax of four hundred (400) dollars and, in addition a specific tax of twenty-five (25) dollars for each and every car used. As this tax of four hundred (400) dollars was thought to be unjust to a small company using but a small part of the public streets of the city, the tax ordinance was changed as herein set forth.

Accordingly, the plaintiff has been charged a specific or business tax on the basis of 18 98 / 100 miles of tracks in the city of Savannah used by the plaintiff, and on the 22nd day of July, 1899, an execution was issued against the plaintiff by the city treasurer, as required by the tax ordinance, for the sum of nineteen hundred (1900) dollars stated in the execution to be "specific tax for the year 1899 under the tax and revenue ordinance passed December 28, 1898."

No part of this claim of nineteen hundred dollars is for the tax on a car. On the 31st day of January, 1899, this plaintiff paid the car tax of twenty-five dollars on each car and took out a badge for each car as required by the ordinance. No execution was issued for the car tax and none was required, and plaintiff voluntarily paid the tax as it had been doing for a number of years.

3. Defendant denies the allegations in the third paragraph of the petition, and says that they are not true. That plaintiff has not paid the taxes or made the return required by law.

4. Defendant denies the allegations in the fourth paragraph of the petition, and, on the contrary, says that the tax required and mentioned in the said execution is a legal tax and is not contrary to law. Defendant says it is not a tax upon real estate belonging to the plaintiff or a property tax at all, but a specific or business tax graduated as mentioned in the ordinance and for the purpose mentioned. It is true that petitioner, through its attorney at law, has taken the position before the corporate authorities of this
22 defendant that it is not liable for any part of the tax mentioned in the tax ordinance as amended, including the specific tax on the basis of every car used; but, notwithstanding this notice, plaintiff has paid the tax of twenty-five dollars per car.

5. As heretofore stated, defendant did, on the 22nd day of July, 1899, cause an execution to be issued against the plaintiff for the sum of nineteen hundred (1900) dollars, but defendant says, that the execution was lawfully issued, that the same is due and owing from the plaintiff, and no reason exists why it should be stopped or interfered with.

Wherefore, defendant prays that the relief asked for by plaintiff may not be granted, and that it may be hence dismissed with its costs.

SAM'L B. ADAMS,
Att'y for Def't, The Mayor and Aldermen of the City of Savannah,
By HERMAN MYERS, *Mayor.*

Attest:
WM. P. BAILEY,
Clerk of Council.

[Seal of Savannah.]

GEORGIA, }
Chatham County. }

You, Herman Myers, do make oath that you are mayor of the city of Savannah and the executive head of the municipal corporation known as the mayor and aldermen of the city of Savannah, and that the allegations of fact in the foregoing answer are true.

HERMAN MYER.

Sworn to and subscribed before me this 25 day of October, 1899.

C. V. HERNANDEZ,
Notary Public, C. C., Ga.

Endorsements on the back: In Chatham superior court. December term, 1899. Savannah, Thunderbolt & Isle of Hope Railway *vs.* Mayor, etc., of Svh. In equity. Answer of def't. Filed in office Dec. 11 '99. J. L. Murphy, dep. clerk S. C. C. C.

23 *Amendment to Plaintiff's Petition* (1st).

In the Superior Court of Chatham County, Georgia, December Term, 1899.

THE SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILway of Savannah, Georgia,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Savannah.
} In Equity.

By leave of the court first had and obtained, the plaintiff amends its petition in the above entitled case, as follows:

First. By adding at the end of paragraph two of the petition the following words: "The original ordinance imposing this tax upon your petitioner and the City & Suburban Railway of Savannah, Ga., was passed December 28th, 1899, and was in these words:" "Street railroad companies, whether under the control of another company or not, shall pay one hundred dollars ($100) per mile, or fraction of a mile of track, and in addition thereto, twenty-five dollars ($25) for each and every car at any time used by such company in the city. It shall also be required that each and every railroad company doing business in this city shall take out badges for all cars employed by them, which badges shall be furnished by the city treasurer, and which shall be numbered." Subsequently on the 22nd day of March, 1899, the foregoing was amended as follows:

"An ordinance to amend that part of the tax ordinance passed December 28th, 1899, relating to street railroad companies, to be found on page 11 of the pamphlet containing the said tax ordinance."

SECTION ONE. Be it ordained by the mayor and aldermen of the city of Savannah in council assembled, That for the purpose of expressing more clearly the intent of council, the words on page 11 of the pamphlet containing the above mentioned tax ordinance,—"Street railroad companies, whether under the control of another company or not, shall pay one hundred dollars (100) per mile or fraction of a mile of track," be and the same are hereby so
24 amended that hereafter they shall read as follows: "Street railroad companies, whether under the control of another company or not, in lieu of the specific tax, heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city, and for the use of the streets of the city, at the rate of one hundred dollars (100) per mile or fraction of a mile of track used in the city of Savannah by said railroad company, and it shall be the duty of the street railroad companies to make a return under oath through their proper official of the amount of their trackage

in the city of Savannah." The balance of the paragraph herein referred to touching street railroad companies, shall remain and read as it now is.

SECTION TWO. Be it further ordained, That all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed."

Your petitioner avers that the mayor and aldermen of the city of Savannah, on March 22nd, 1899, were without the power to pass the said amendment, by which they undertook to transform specific property tax into a so-called license tax. The amendment itself does not legally constitute a license tax. It is not competent for the mayor and aldermen of Savannah to impose a license tax or a business tax upon railroad companies. There is no provision of law in Georgia whatsoever, authorizing the municipal authorities of this State to compel railroad companies of any kind, to pay for the privilege of doing business in the city or for the use of the streets of the city. All taxation upon railroads by municipal authorities must be levied and collected according to the provisions of the law, regulating municipal taxation of railroads. All railroads stand upon the same footing, as regards taxation. The said mayor and aldermen of Savannah have discriminated against your petition- and the City — Suburban Railway of Savannah, Ga., in that they have not imposed this tax upon any other railroad company doing business in Savannah, although there are other railroad companies who do business in the city, and use the streets of the city by consent of the mayor and aldermen.

25 Second. By adding at the end of the third paragraph of the petition the following words: " Your petitioner and the City & Suburban Railway of Savannah, Ga., paid to the State of Georgia, county of Chatham and city of Savannah, for the year 1898, the following taxes:

Statement of Taxes Paid by S., T. & I. of H. Ry. for 1898.

City taxes.	Amounts.	Discounts.
S., T. & I. of H. railway:		
Badge tax	275.00	27.50
Business tax	400.00	40.00
Property tax value 1078.78 at 1.45	1564.23	156.42
City & Suburban:		
Badge tax	375.00	37.50
Business tax	400.00	40.00
Property tax value 624.26 at 1.45	905.17	90.51
	3919.40	391.93

State taxes.

S., T. & I. of H. railway:

Property, value 1528.38 at 6.21 mills.....	$949.15	None
City & Suburban:		
Property, value 1421.18 at 6.21 mills.....	882.55	"
	1831.70	

County taxes.

S., T. & I. of H. railway:

Property value 1421.18 at 6.49 mills.....	991.92	None
City & Suburban:		
Property value 1421.18 at 6.49 mills.....	922.35	"
	1914.27	

Recapitulation.

City taxes	3919.40	
Less discount.....	391.93	
		$3527.47
State taxes no discount		1831.70
County taxes" "		1914.27
Total taxes paid in 1898.....		7273.44

For the year 1898, your petitioner and the City and Suburban Railway of Savannah, Ga., have paid to the State of Georgia, county of Chatham and the city of Savannah, the following taxes already, and the additional taxes here resisted are being insisted upon by the city. The items of those paid already are as follows:

Recapitulation.	Assessed.	Deductions.
City taxes	3156.60	322.91
State taxes.....	1587.64	4.71
County taxes.....	1860.08	4.02
	6604.32	331.64
Less deductions..	331.64	
Total taxes paid for 1899.....	6272.68	

26 Third. By adding at the end of the fourth paragraph of the petition the following words: "On November 4th, 1897, the said mayor and aldermen of Savannah entered into a contract with your petitioner and the City and Suburban Railway of Savannah, Ga., by which for a valuable consideration received by the city

the use of the streets for railway purposes which are now occupied by your petitioner and the City and Suburban Railway of Savannah, Ga., was guaranteed to them. It was expressly guaranteed that all the lines of railway provided for in the plan specified in said contract should be regularly operated upon reasonable schedules, the only condition attached to it being, that any portion of the same might be discontinued by authority of the mayor and aldermen of Savannah. Your petitioner has paid said sums of money contemplated by said contract, and has caused to be conveyed to it, the land called for by said contract. Your petitioner avers that under this contract, according to its true intent and meaning, the free use of the streets mentioned was granted, and guaranteed to your petitioner and the City & Suburban Railway of Savannah, Ga. The city of Savannah is bound by said contract, and has no legal right to violate the same, by requiring your petitioner to pay any additional sums of money for the right to use said streets.

Wherefore your petitioner prays that a permanent injunction may be granted as prayed for in the original petition.

BARROW & OSBORNE,
Plaintiff's Sol's.

GEORGIA,
Chatham County.

Before me personally came H. M. Lofton, general manager of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., who being duly sworn deposes and says that the allegations in the foregoing petition are true, except wherein they are stated upon information and belief.

H. M. LOFTON,
General Manager Savannah, Thunderbolt & Isle of Hope Railway.

Sworn to and subscribed before me this first day of January, 1900.

M. NAUGHTIN,
J. P., C. Co., Ga.

Amendment allowed.

R. FALLIGANT, *Judge.*

27 Endorsements on the back: In the superior court of Chatham Co. Ga. Dec. term, 1899. The Savannah, Thunderbolt and Isle of Hope Railway of Sav'h Ga. *vs.* The Mayor and Aldermen of the City of Savannah. Amendment to plaintiff's petition. Filed in office Jan'y 5, 1900. James K. P. Carr, clerk S. C. C. C.

2nd Amendment to Petition.

In the Superior Court of Chatham County, Georgia, December Term, 1899.

THE SAVANNAH, THUNDERBOLT & ISLE OF HOPE Railway of Savannah, Ga.,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Savannah.
} In Equity.

And now comes the plaintiff in the above-entitled case, and by leave of the court first had and obtained, amends its petition as follows, to wit: By adding at the end of the fourth paragraph of the original petition, the following additional words:

First. "Your petitioner avers that the ordinance passed by the mayor and council of the city of Savannah, December 28th, 1898, and subsequently amended on March 22nd, 1899, is unconstitutional, null and void. It is an authority exercised under the State of Georgia, and is repugnant to the Constitution of the United States, in that it impairs the obligation of the contract entered into between the said mayor and aldermen of the city of Savannah and your petitioner on November 4th, 1897, a copy of which is hereto attached as exhibit marked "A," which your petitioner prays may be taken as a part of this petition. Your petitioner avers that any construction of the constitution and laws of the State of Georgia, under authority of which the said ordinance above referred to was passed which would give validity to said ordinance makes it repugnant to that clause in the Constitution of the United States which declares that no State shall pass any law which impairs the obligation of a contract. The said the mayor and aldermen of the city of Savannah were paid on November 4th, 1897, in money and
28 in land for the privilege of using the same streets of Savannah which are now used, the said the mayor and aldermen received said money and land, and in consideration thereof entered into a contract with your petitioner, granting the right to use of said streets. To undertake now to impose an additional burden, and make an additional charge, is a violation of that contract, and impairs its obligation.

Second. The said ordinance of December 28th, 1898, amended March 22nd, 1899, is unconstitutional, null and void, in that it is repugnant to the fourteenth amendment of the Constitution of the United States, for the reason that it is an attempt to take your petitioner's property without due process of law. This ordinance is an authority exercised under the State of Georgia, and there is no law in that State which authorizes the municipal government of a city to levy any license tax or business tax upon a railroad of any kind,

nor to compel a railroad company of any kind to pay for the privilege of doing business.

Wherefore your petitioner prays that by a decree in this court, the said ordinance may be decreed to be null and void, upon the ground that it being an authority exercised under the State, is repugnant to the Constitution of the United States.

And as in duty bound, your petitioner will ever pray, etc.

BARROW & OSBORNE,
Plaintiff's Att'ys.

GEORGIA,
Chatham County.

Before me personally appeared H. M. Lofton, general manager of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., who on oath says that the facts stated in the foregoing amendment are true.

H. M. LOFTON,
Gen. M'g'r S., T. & I. of H. Ry.

Sworn to and subscribed before me this 5th day of January, 1900.

ROB'T M. HITCH,
Notary Public, C. C., Ga.

[SEAL OF NOTARY.]

Amendment allowed.

R. FALLIGANT, *Judge.*

29 *Contract with City Nov.* 4/97.

The committee on streets and lanes to which was referred the petition of the Savannah, Thunderbolt and Isle of Hope Railway, relative to the adjustment of its lines, submit the following report:

SAVANNAH, GA., *Nov.* 3, 1897.

To the honorable mayor and aldermen of the city of Savannah in council assembled:

The committee on streets and lanes to which was referred the petition of the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Ga., dated June 29, 1897, in relation to the readjustment of its lines within the city of Savannah, begs leave to report that:

I. After a number of conferences between this committee and the officials of said petitioner, involving a discussion of this important matter, in all its bearings, not only in reference to the establishment of a more complete and compact railway system (including the lines of petitioner as well as those of the City and Suburban Railway Company, operated by said petitioner), better adapted than the present one to existing requirements, and to future needs of the public; but at the same time requiring the said railway company

to afford the public better accommodation and service, the following has been determined upon by this committee as the plan to which said railway company must conform the tracks of said system, to-wit:

1. A double belt to be known as the "Whitaker, Barnard and Abercorn belt," commencing at the intersection of Abercorn and Bay streets, and running west along Bay street to Barnard street, thence south along Barnard street to Second street, thence east along Second street to Whitaker street, thence south along Whitaker street extended to Tenth street, thence east along Tenth street to Abercorn street, thence north along Abercorn street to the point of beginning, and commencing at the intersection of Whitaker and Bay streets and running south along Whitaker street to Second street, the double tracking on Abercorn street, including squares from its intersection with Bay street to its intersection with Tenth street, to be completed; the tracks on Bay street, between Abercorn and Barnard streets to remain as they are now.

2. A belt to be known as the "Outside belt," commencing at the intersection of Bay and East Broad streets, and running west along Bay street to West Broad street, thence south along West Broad street to Anderson street, thence east along Anderson street to East Broad street, and thence north along East Broad street to the place of beginning; the tracks on Bay street to remain as they are now, except that the double tracking is to be completed thereon between Barnard and West Broad street, the double tracking on West Broad street, from its intersection with Bay St. to its intersection with Anderson street to be completed; the double tracking on Anderson street from its intersection with West Broad street to its intersection with East Broad street to be completed; the double tracking on East Broad street from its intersection with Anderson street to its intersection with Bay street to be completed; so that this entire belt will be double tracked.

3. "Liberty Street line," commencing at the intersection of Liberty and West Broad street, and running *each* along Liberty street to Randolph street, thence north along Randolph street to President street, thence west along President street to East Broad street, connecting thereat with the "Outside belt."

4. "Battery Park spur," commencing at the intersection of West Broad and Anderson streets, and running thence westwardly along Anderson street, to the Ogeechee road, and thence along the Ogeechee road to Battery park.

5. "Montgomery Street spur," commencing at the intersection of Anderson and Montgomery streets, and running thence southwardly along Montgomery street to Twelfth street.

6. "Indian Street spur," commencing at the intersection of Bay and West Broad streets, and running thence northwardly to Indian street, and thence running through Indian street to the bridge across the Ogeechee canal.

6. "Habersham and Broughton Streets line," commencing at the

intersection of Seventh and Habersham streets, and running
31 thence northwardly along Habersham street to St. Julian street, thence westwardly along St. Julian street around Johnson square, through the market to Montgomery street, thence southwardly along Montgomery street to Broughton street, thence westwardly on and along Broughton street to West Broad, and also eastwardly on Broughton, from Montgomery street to Habersham street; the double tracking on Habersham street, including squares, to be completed from Seventh street to Broughton street, and said line on St. Julian, Montgomery and Broughton streets forming a loop in connection with the trackage on Habersham street.

7. "Bolton Street line," commencing at the intersection of Abercorn and Bolton streets, and running eastwardly along Bolton street and Bolton street extended to the city limits.

8. "Gwinnett Street spur," commencing at the intersection of Gwinnett and Habersham streets, and running thence eastwardly along Gwinnett street and Gwinnett street extended to Ott street, and thence southwardly along Ott street to Henry street.

II. In order to carry out the plan delineated above, and to enable the railway company to properly operate the lines and spurs above described, it is necessary that certain existing trackage should be removed, and such removals are required by the mayor and aldermen of the city of Savannah, to wit:

(*a.*) The tracks on Robert street beginning at its intersection with West Broad street, and extending through Roberts street to its intersection with Cemetery street, and on Cemetery street for its entire length.

(*b.*) The tracks on Montgomery street beginning at its intersection with Liberty street and running thence southwardly through Montgomery street to Anderson.

(*c.*) The tracks on Duffy street beginning at its intersection with Cemetery street and running through Duffy street eastwardly to its intersection with Price street.

(*d.*) The tracks on Price street beginning at its intersection with Duffy street, and running northwardly through Price street to its intersection with St. Julian street.

32 (*e.*) The tracks on St. Julian street from its intersection with Price street to its intersection with Habersham street.

(*f.*) The tracks on Habersham street commencing at its intersection with Seventh street and running southwardly along Habersham street extended to its intersection with Estill avenue, including the removal of the bridge over the right of way of the Savannah, Florida and Western railway.

(*g.*) The tracks of Estill avenue, commencing at its intersection with Habersham street extended and running westwardly along said avenue across Bull street and thence westwardly along what is known as Best street, to its intersection with Montgomery street.

(*h.*) The tracks on Montgomery street from its intersection with what is known as Best street to its intersection with Twelfth street.

(i.) The tracks on Montgomery street from its intersection with Broughton street and extending through said Montgomery street southwardly to President street, and thence west on President street to West Broad street.

(j.) The tracks on Second street from its intersection with Whitaker street, and running eastwardly to its intersection with Abercorn street.

III. This plan also contemplates the removal of the turnouts leaving a single track on Whitaker street, between Bay street and Second street and the same is required of petitioner.

It further contemplates that the tracks in front of the entrance of the Central of Georgia railway passenger depot shall be so adjusted in pursuance of a joint plan to be formulated by the city engineer and the engineer of the railway company, under the superintendence of the committee on streets and lanes, as to accommodate the public and decrease the danger of accidents immediately in front of said passenger depot, and the same is to be done as soon as it reasonably can be by said railway company.

IV. In order to carry out the above plan it is necessary that petitioner should lay, or cause to be laid, certain additional tracks beyond what has already been defined as completion of existing
33 double tracking on streets, and the same are permitted and required to be laid by the mayor and aldermen of the city of Savannah, towit:

(a.) On Tenth street a double track is to be laid from its intersection with Whitaker street extended to its intersection with Abercorn street.

(b.) On Abercorn street a double track is to be laid from its intersection with Tenth street, extended through Abercorn street northwardly to its intersection with Second street, in addition to which the double tracking will be completed on said Abercorn street, including squares, to Bay street as hereinbefore stated.

(c.) On Second street a track is to be laid from its intersection with Whitaker street to its intersection with Barnard street.

(d.) On Barnard street from its intersection with Second street a track is to be laid extending through said Barnard street northwardly to Anderson street.

(e.) On Habersham street from Broughton street to St. Julian street a track is to be laid, connecting in the square with the present line on said last named street.

V. In the negotiations leading up to the adoption of the above mentioned plan this committee on behalf of the city insisted that the following specific things be done by the railway company, to wit:

(a.) On Barnard street and Second street, where the said railway company is to lay a track from Anderson street to Second street and along Second street to Whitaker street extended, it is necessary to open up Barnard street and clear it of the obstruction now existing therein. The mayor and aldermen of the city of Savannah is to purchase the land not already purchased on said Barnard street be-

tween Anderson and Second streets, so as to completely open the said street between said points, and the said railway company is to pay to the city a sum of money equivalent to the amount necessary for said purpose, a proper allowance being made by the owner of the land obstructing said Barnard street in the way of frontage on Bull street to be allowed him by the city.

(*b.*) It becomes necessary in laying the double track of said railway company on Tenth street, between Whitaker street ex-
34 tended and Abercorn street, to open said Tenth street, between Whitaker extended and Bull street. The mayor and aldermen of the city of Savannah will proceed to open said Tenth street, between Whitaker extended and Bull street, and it is required of the said railway company that it pay into the treasury of the city of Savannah a sum of money equivalent to one half of the amount expended for said purpose.

(*c.*) The said railway company is to procure from the City and Suburban Railway Company (which owns certain land in Barnard street extended from Second street southwardly, amounting to twenty-nine thousand, nine hundred and sixty-three tenths (29,960.3) square feet) a conveyance of the same to the mayor and aldermen of the city of Savannah, free of cost, as a part of Barnard street.

(*d.*) The said railway company, owning certain land in Bolton street, is to convey to the mayor and aldermen of the city of Savannah, so as to aid it in opening Bolton street eastwardly of the Savannah, Florida and Western railway tracks, all of the right, title, interest, and estate of the said Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, in and to such lands in Bolton street, preserving, of course, the easement of the said street railway company over said land for its railway purposes.

(*e.*) It was deemed by the committee to be a matter of great importance to the people of Savannah, that Price street should be opened from one end to the other as a driveway, the same being a very narrow street, and upon which no railway track should be laid, and in view of the fact that the plan adopted by the committee affords ample street railway facilities to the residents of this section of the city, the committee insisted as one of its conditions that the railway company should remove its tracks from this street.

(*f.*) The fare to be charged from any point on said railway system to any other point on the same within the limits of the city of Savannah shall be five (5) cents for each passenger so conveyed upon a continuous passage by day or by night, proper transfer or transfers to be given such passengers at all intersecting points; this being intended to cover the said street railway system, as composed
35 of the lines of petitioner, as well as those of the city and Suburban Railway Company, and of any other lines which may hereafter be acquired or operated by said petitioner within the limits of the city of Savannah.

(*g.*) The said railway company is to procure from the City and Suburban Railway Company a conveyance to the mayor and alder-

men of the city of Savannah, free of cost, of all the right, title, interest and estate of the said last named railway company in and to that portion of Whitaker street which runs through the City and Suburban Railway stables property, lying between Second and Fourth streets, preserving, of course, the easement of the said railway company over said land for its railway purposes.

VI. The railway company accepted these terms upon the express condition, however, that in consideration of all the foregoing and of the benefits accruing to the mayor and aldermen of the city of Savannah and to the public, especially in the removal of the tracks from that portion of Price street, extending from St. Julian street to Duffy street, at the instance and request of the city, should any other street railway company desire to occupy said portion of Price street and the mayor and aldermen of the city of Savannah should grant permission to do so, such railway company shall pay Savannah six (6) dollars per running foot for so much of said portion of Price street as may be occupied by the tracks of the same, which sum of money shall be paid over by the mayor and aldermen of the city of Savannah to said Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, its successors or assigns. This condition was considered by the committee as just and equitable and was agreed to as such.

Wherefore this committee recommends that the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Ga., be authorized to readjust or cause to be readjusted, the lines and tracks of said railway system, in accordance with the aforesaid plan adopted by this committee, a map of which is filed with this report; and to that end the said railway company be required to take up and remove tracks from the streets or sections of streets which, under said
36 plan, will be no longer needed for railroad purposes, to construct new tracks on the streets or sections of streets as called for by said plan, to construct and complete the double tracking contemplated by said plan, to take up and remove or cause to be taken up and removed the turnouts and switches contemplated by said plan, to put in and construct such turnouts, curves and switches as may be required in perfecting said plan, and to make such other minor changes in the tracks of said system of street railroad as may be necessary to perfect the said plan, the entire work to be under the direction of the committee on streets and lanes and of the city engineer.

Before any steps shall be taken by the railway company toward putting said plan into operation the said company shall signify in writing to the mayor and aldermen of the city of Savannah its acceptance of the terms and conditions imposed upon it by this report, and shall additionally bind itself in a manner satisfactory to the city attorney that it will promptly, and in good faith, perform its several obligations in the premises. All the lines provided for in the foregoing plan shall be regularly operated upon reasonable schedules by said railway company, unless at any time the opera-

tion of any portion of the same shall be discontinued by authority of the mayor and aldermen of the city of Savannah.

T. J. DAVIS, *Chairman.*
W. F. REID, *Alderman.*
JOHN W. SMITH, *Alderman.*
S. KROUSKOFF, *Alderman.*
W. W. OWENS, *Alderman.*

The ayes and nays being called for, the vote resulted as follows: Ayes: Weil, Charlton, Davis, Reid, Owens, Krouskoff, Smith, Hull—8. Nays: Guckenheimer, Wylly—2. Report adopted.

GEORGIA, }
Chatham County. }

This agreement entered into this — day of April in the year 1898, between the Mayor and Aldermen of Savannah, and the Savannah, Thunderbolt & Isle of Hope Railway, a corporation of said State and county, witnesseth:

37 Whereas, heretofore, to wit, on November 4th, 1897, a contract was entered into by and between the above named parties, readjusting the lines of street railway in the city of Savannah; and

Whereas, it is mutually desired that said contract should be modified in certain particulars:

Therefore, in consideration of the increased facilities which will be furnished to the public by the removal of switches and dispensing with tracks in the streets hereinafter referred to, and the convenience to the said railway in operating its lines, it is mutually agreed by and between the Mayor and Aldermen of the City of Savannah, party of the first part, and the Savannah, Thunderbolt & Isle of Hope Railway, party of the second part, that said contract be changed in the following respects and to the following extent; and the provisions hereof shall be embodied in, and become a part of said contract:

First. The railway company shall remove its switches or side track in Broughton street, and shall run a single straight track in place of same; and shall pave with asphaltum the space outside the rails where the pavement is removed, from end to end of the track in said street, including the space formerly occupied by switch or side track.

Second. The railway shall not remove its track from Duffy street, and shall not place a double track on Anderson street, nor in that southern portion of East Broad street where there is now only a single track, nor in that western portion of Bay street between Barnard and West Broad street. The switches in Duffy street are to be taken out by the railway as soon as the guage is changed so that it can be operated in connection with Anderson street.

Third. The railway company shall extend its track on Duffy street to East Broad and connect it there by a suitable curve or curves with the track of East Broad.

Fourth. In all other respects as herein expressly provided, the said contract of November 4th, 1897, shall remain in full force.

Fifth. This agreement is made by the mayor and aldermen of Savannah in council assembled and by the board of directors of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, the action of the said mayor and aldermen being evidenced by their public records and minutes and that of the said railway being signified to the said mayor and aldermen by the proper officer in writing under the seal of the said railway.

38

GEORGIA, }
Chatham County. }

This agreement made between the Mayor and Aldermen of the City of Savannah, party of the first part, and the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., party of the second part, witnesseth:

That for and in consideration of the mutual convenience and advantage to the two parties above mentioned, the contract of November 4th, 1897, between them, readjusting the lines of St. railway in Savannah, Ga., which has been subsequently modified, be and the same is hereby further modified and changed as hereinafter provided and the terms of this agreement shall become a part of said contract of November 4th, 1897.

First. The line of railway of the City and Suburban Railway of Savannah, Ga., shall be extended southward on Barnard St. from Second St. to Tenth St., and eastwardly through Tenth St. from Barnard St. to Whitaker, to its intersection with the present line at that point and the right to lay down, construct, maintain and operate said railway through said streets as before stated is granted, subject to the control and regulation of the said mayor and aldermen, the same as other lines of railway as provided in said contract of November 4th, 1897.

Second. The line of railway on Second St. from Barnard to Whitaker shall be taken up and removed.

Third. In all other respects, except as herein expressly provided, the said contract of Nov. 4th, 1897, and modifications of the same heretofore made shall remain in full force.

Fourth. This agreement is made by the mayor and aldermen of Savannah in council assembled and by the board of directors of the Savannah, Thunderbolt and Isle of Hope Railway of Savannah; the action of the said the mayor and aldermen being evidenced by their public records and minutes, and that of the said railway being signified by the said mayor and aldermen by the proper officer in writing under the seal of the said railway. Done this July 27th, 1898.

39

Endorsements on the back: In the superior court of Chatham county, Dec. term, 1899. S. T. & I. of H. Ry. of Savannah, Ga. *vs.* The Mayor and Aldermen of Savannah. 2nd amendment filed in office Jan'y 5, 1900. J. J. Murphy, dep. clerk S. C. C. C.

Order of Judge Refusing Injunction.

In Chatham Superior Court.

SAVANNAH, THUNDERBOLT AND ISLE OF HOPE RAILway of Savannah, Ga.,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF SAvannah. } Injunction.

In the above stated cause, in which the declaration was filed and the order to show cause was granted on the 19th day of August, 1899 (ninety-nine), the court being of the opinion that the tax required and the execution issued are lawful, it is considered and ordered that the prayer for a temporary injunction be and the same is denied, and the restraining order heretofore granted be and the same is hereby set aside. This February 19, 1900.

R. FALLIGANT,
Judge E. J. C. of Geo.

SAM'L B. ADAMS,
Att'y for Def't.

Endorsements on the back: In Chatham superior court. Savannah, Thunderbolt and Isle of Hope Railway of Sav'h, Ga. *vs.* The Mayor and Aldermen of the City of Sav'h. Injunction. Order denying injunction and setting aside restraining order. Filed in office Feb. 19, 1900. James K. P. Carr, clerk S. C. C. C.

40 *Amendment to Defendant's Answer.*

In Chatham Superior Court.

SAVANNAH, THUNDERBOLT & ISLE OF HOPE Railway of Savannah, Georgia,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Savannah. } Injunction, etc.

And now comes the above named municipal corporation, by its attorney at law, and in answer to the amendments filed in said cause (which is the cause brought originally to the December term, 1899, of the superior court of Chatham county), says that it denies

each and all of the allegations contained in the said amendments, and says that the said allegations are not true, and that no contract upon the subject of the taxation or non-taxation of the above named plaintiff was made or attempted to be made or could be made by this defendant.

SAM'L B. ADAMS,
Att'y for Def't.

Amendment allowed. In open court this 12th day of July, 1901

R. FALLIGANT, *Judge.*

Endorsements on the back: In Chatham sup. court. Business tax case. Sav'h, Thunderbolt & Isle of Hope R. R. *vs.* Mayor, etc., of Savannah. Injunction. Amendment filed in office Jul- 12, 1901. James K. P. Carr, clerk S. C. C. C.

Verdict.

SAVANNAH, *Jul-* 12/01.

We the jury find for the defendant.

JOHN S. HAINES, *Foreman.*

Judgment on the Verdict.

In Chatham Superior Court.

SAVANNAH, THUNDERBOLT AND ISLE OF HOPE Railway of Savannah, Ga., *vs.* THE MAYOR AND ALDERMEN OF THE CITY OF Savannah. } Injunction, etc.

41 The jury in the above stated cause,—it being that filed August 19, 1899, to the December term, 1899, of this court,—having this day, under the instructions of the court, returned a verdict for the defendant, the above named municipal corporation, it is considered and ordered, that the said verdict be and it is hereby made the judgment and decree of the court, and that the plaintiff pay the costs of court. In open court this 12th day of July, 1901.

R. FALLIGANT,
Judge E. J. C. of Geo.

Endorsements on the back: In Chatham sup. court. #489. Sav'h, Thunderbolt & Isle of Hope Rwy. Co. *vs.* Mayor, etc., of Sav'h. Judgment on verdict. Filed in office July 12th, 1901. James K. P. Carr, clerk S. C. C. C.

Motion for New Trial.

In the Superior Court of Chatham County, Georgia.

THE S., T. & I. OF H. RY. OF SAVANNAH
vs.
THE MAYOR AND ALDERMEN OF SAVANNAH. } Motion for New Trial.

The jury in the above entitled case, on the 12th day of the present month, and during the present term of the court, under instructions from the judge, found a verdict for the defendant, and thereupon a decree was entered. And now within thirty (30) days comes the plaintiff, The Savannah, Thunderbolt & Isle of Hope Railway, and moves the court to set aside said verdict and grant it a new trial in said case, upon the following grounds, to wit:

First. The verdict is without evidence to support it.

Second. The verdict is contrary to law.

Third. The court erred in instructing a verdict for the defendant.

Fourth. Said verdict and decree for the defendant are erro-
42 neous, for the reason that the evidence showed that other railroads using the streets of Savannah by permission from council, for local business and carrying on therein a strictly local business, were not taxed on their business and were not charged anything for the privilege of using the streets, the evidence thus making it clear that the said ordinance was not uniform on all individuals of the same class and was consequently a void ordinance, denying to the plaintiff the equal protection of the laws and being violative of the 14th amendment of the Constitution of the United States.

Fifth. The said verdict and judgment are erroneous, for the reason that the evidence showed that a contract existed between the said railway and the said city of Savannah, by which the privilege of using the streets of Savannah was granted by the city to the railway and paid for by the railway, and this ordinance is an impairment of the obligation of that contract, in that, it seeks to compel the said railway to pay for the privilege of using the same streets which it had already bought and paid for.

Sixth. The said verdict and judgment are erroneous for the reason that Whitaker and Bolton streets are included in the mileage which is charged for, while the evidence shows that a portion of Whitaker and Bolton street- were conveyed to the city by the railway and the right to the use for railway purposes reserved.

Seventh. The said verdict and decree are erroneous for the reason that there is no law in the State of Georgia which authorizes the municipal government of any city to levy any license tax or business tax upon a railroad company of any kind nor to compel a railroad company of any kind to pay for the privilege of doing business

in said city; said ordinance for this reason being void as an attempt to take the plaintiff's property without due process of law and being repugnant to the 14th amendment of the Constitution of the United States.

Wherefore the said The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, prays that said verdict and decree may be set aside and a new trial granted.

BARROW & BARROW,
Attorneys for S., T. & I. of H. Ry.

43 Let motion be filed in office and let a copy of the same and of this order be served upon the defendant before the hearing hereinafter provided for.

The defendant, The Mayor and Aldermen of Savannah, will show cause before me on the 27th day of July, in the present month, at ten (10) o'clock, a. m., why a new trial should not be granted. In open court July 19th, 1901.

R. FALLIGANT,
Judge E. J. C. of Georgia.

Endorsements on the back: In the superior court of Chatham Co. June term, 1901. The Sav'h, Thunderbolt & Isle of Hope Rwy. of Savannah, Ga. *vs.* The Mayor and Aldermen of Savannah. Motion for new trial. Filed in office July 19, 1901. J. L. Murphy, dep. clerk S. C. C. C. Due and legal service of the within motion for a new trial and rule *nisi* acknowledged. This July 19th, 1901. Sam'l B. Adams, def't's att'y.

Brief of the Evidence.

In the Superior Court of Chatham County, Georgia.

THE S., T. & I. OF H. RAILWAY OF SAVANNAH, GA.,
vs.
THE MAYOR AND ALDERMEN OF SAVANNAH, GA.

Brief of evidence on the motion for a new trial for the plaintiff.

Testimony of H. M. Lofton, general manager of the Savannah, Thunderbolt & Isle of Hope railway in 1899 and 1900.

There are eight (8) miles of track of the City and Suburban Railway of Savannah, Ga., in the corporate limits of the city of Savannah, and ten (10) miles of track outside of the corporate limits of the city of Savannah. There are twelve and one half (12½) miles of track of the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Ga., in the corporate limits of the city of Savannah, and

five and one half (5½) miles of track outside of the corpo-
44 rate limits of the city of Savannah. All taxes due to the State of Georgia, county of Chatham, and city of Savannah, by both of said railways have been regularly returned to the comptroller-general under the act of October 16th, 1899, and the act of December 24th, 1890, the latter entitled "An act to make railroad companies subject to municipal taxation," and the taxes provided for by these laws have been paid every year in accordance with said laws since the passage of the act of December 24th, 1890. The Central of Georgia railroad is now and has been for years using some of the streets of Savannah, particularly River street, by laying down its tracks longitudinally thereon and operating its trains upon it by the consent of the mayor and aldermen of the city of Savannah. Witness is informed and believes that no attempt has been made to impose any tax upon said Central of Georgia railway for the privilege of using said streets. They use nearly a mile of River street with their tracks laid longitudinally thereon.

Certified copy of tax returns of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., to the comptroller-general of the State of Georgia for the year 1899, showing—

Value of rolling stock and other personal property in this State	$64,713.50
Value of real estate and road bed in this State	82,000.00
Aggregate value of whole property in this State	$146,713.51
State taxes, rate 5.36, amount	786.38

Chatham.

Main and side track—miles 18, value	$72,000.00
Value of real estate, including bridges, etc	10,000.00
Value of track and real estate	82,000.00
Pro rata value of personal property	64,713.50
Aggregate value in county	$146,713.51

Savannah.

Main and side track—miles, 12½.

Value	$50,000.00
Value of real estate	10,000.00
Value of track and real estate	60,000.00
Pro rata value of personal property	47,351.00
45 Aggregate value in city or town	$107,351.00

Certified by Wm. A. Wright, comptroller general.

Certified copy of tax returns of the City & Suburban Railway of Savannah, Ga., to the comptroller general of the State of Georgia for the year 1899.

Value of rolling stock and other personal property in this State	$36,730.67
Value of real estate and road bed in this State	111,000.00
Aggregate value of whole property in this State	$147,730.67
State taxes, rate 5.36, amount	791.83

Chatham county.

Main and side track—miles, 18.

Value	$72,000.00
Value of real estate, including bridges, etc	39,000.00
Value of track and real estate	111,000.00
Pro rata value of personal property	36,730.67
Aggregate value in county	$147,730.67

Savannah city.

Main and side track—miles, 8.

Value	$32,000.00
Value of real estate	10,000.00
Value of track and real estate	43,000.00
Pro rata value of personal property	13,898.00
Aggregate value in city or town	$55,898.00

Certified by Wm. A. Wright, comptroller general.

Tax Receipts for 1899 *Paid.*

State taxes	$1,582.93
County taxes	1,856.06
City taxes	2,833.69
Total amount, including badge taxes	$6,272.68

Contract with the city of Savannah as follows:

The committee on streets and lanes, to which was referred the petition of the Savannah, Thunderbolt & Isle of Hope railway relative to the adjustment of its lines, submit the following report:

46 SAVANNAH, GA., *Nov.* 3, 1897.

To the honorable mayor and aldermen of the city of Savannah in council assembled:

The committee on streets and lanes, to which was referred the petition of the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Ga., dated June 29th, 1897, in relation to the readjustment of its lines within the city of Savannah, beg leave to report that:

I. After a number of conferences between this committee and the officials of said petitioner, involving a discussion of this important matter in all of its bearings, not only in reference to the establishment of a more complete and compact railway system (including the lines of petitioner as well as those of the City and Suburban Railway Company, operated by said petitioner), better adapted than the present one to existing requirements and to future needs of the public, but at the same time requiring the said railway company to afford the public better accommodation and service, the following has been determined upon by this committee as the plan to which said railway company must conform the tracks of said system, to-wit:

1. A double belt, to be known as the "Whitaker, Barnard and Abercorn belt," commencing at the intersection of Abercorn and Bay streets and running west along Bay street to Barnard, thence along Barnard street to Second street; thence east along Second street to Whitaker street, thence south along Whitaker street extended to Tenth street, thence east along Tenth street to Abercorn street; thence north along Abercorn street to the point of beginning, and commencing at the intersection of Whitaker and Bay streets and running south along Whitaker street to Second street; the double track on Abercorn street, including squares from its intersection with Bay street to its intersection with Tenth street, to be completed; the tracks on Bay street between Abercorn and Barnard street to remain as they are now.

2. A belt to be known as the "Outside belt," commencing at the intersection of Bay and East Broad street and running west along

47 Bay street to West Broad street, thence south along West Broad street to Anderson street, thence east along Anderson street to East Broad street, and thence north along East Broad street to the place of beginning; the tracks on Bay street to remain as they are now, except that the double tracking is to be completed thereon between Barnard and West Broad street; the double tracking on West Broad street from its intersection with Bay street to its intersection with Anderson street to be completed; the double tracking on Anderson street from its intersection with West Broad street to its intersection with East Broad street to be completed; the double tracking on East Broad street from its intersection with Anderson street to its intersection with Bay street to be completed, so that this entire belt will be double tracked.

3. "Liberty Street line," commencing at the intersection of Liberty and West Broad streets and running east along Liberty street to Randolph street, thence north along Randolph street to President street, thence west along President street to East Broad street, connecting thereat with the "Outside belt."

4. "Battery Park spur," commencing at the intersection of West Broad and Anderson streets and running thence westwardly along Anderson street to the Ogeechee road, and thence running along the Ogeechee road to Battery park.

5. "Montgomery Street spur," commencing at the intersection of Anderson and Montgomery streets and running thence southwardly along Montgomery street to Twelfth street.

6. "Indian Street spur," commencing at the intersection of Bay and West Broad street- and running thence northwardly to Indian street, and thence running through Indian street to the bridge crossing the Ogeechee canal.

6. "Habersham and Broughton Street- line," commencing at the intersection of Seventh and Habersham streets and running thence northwardly along Habersham street to St. Julian street, thence westwardly along St. Julian street around Johnson square, through the market to Montgomery street; thence southwardly along
48 Montgomery street to Broughton street, thence westwardly on and along Broughton street to West Broad street, and also eastwardly on Broughton street from Montgomery street to Habersham street; the double tracking on Habersham street, including the square to be completed from Seventh street to Broughton street, and said line on St. Julian, Montgomery and Broughton street- forming a loop in connection with the trackage on Habersham street.

7. "Bolton Street line," commencing at the intersection of Abercorn and Bolton streets, and running eastwardly along Bolton street and Bolton street extended to the city limits.

8. "Gwinnett Street spur," commencing at the intersection of Gwinnett and Habersham streets and running thence eastwardly along Gwinnett street and Gwinnett street extended to Ott street, and thence southwardly along Ott street to Henry street.

H. In order to carry out the plan delineated above, and to enable the railway company to properly operate the lines and spurs above described, it is necessary that certain existing trackage should be removed, and such removals are required by the mayor and aldermen of the city of Savannah, to wit:

a. The tracks on Roberts street, beginning at its intersection with West Broad street and extending through Roberts street to its intersection with Cemetery street, and on Cemetery street for its entire length.

b. The tracks on Montgomery street beginning at its intersection with Liberty street and running thence southwardly through Montgomery street to Anderson street.

c. The tracks on Duffy street, and running through Duffy street eastwardly to its intersection with Price street.

d. The tracks on Price street, beginning at its intersection with Duffy street and running northwardly through Price street to its intersection with St. Julian street.

e. The tracks on St. Julian street from its intersection with Price street to its intersection with Habersham street.

49 *f.* The tracks on Habersham street, commencing at its intersection with Seventh street and running southwardly along Habersham street extended to its intersection with Estill avenue, including the removal of the bridge over the right of way of the Savannah, Florida and Western railway.

g. The tracks on Estill avenue, commencing at its intersection with Habersham street extended and running westwardly along said avenue across Bull street and thence westwardly along what is known as Best street to its intersection with Montgomery street.

h. The tracks on Montgomery street from its intersection with what is known as Best street to its intersection with Twelfth street.

i. The tracks on Montgomery street from its intersection with Broughton street, and extending through said Montgomery street southwardly to President street and thence westwardly on President street to West Broad street.

j. The tracks on Second street from its intersection with Whitaker street and running easterly to its intersection with Abercorn street.

This plan also contemplates the removal of the turnouts, leaving a single track on Wgitaker street between Bay street and Second street, and the same is required of petitioner.

It is further contemplated that the tracks in front of the entrance of the Central of Georgia railway passenger depot shall be so adjusted in pursuance of a joint plan to be formulated by the city engineer and the engineer of the railway company, under the superintendence of the committee on streets and lanes, as to accommodate the public and decrease the danger of accidents immediately in front of said passenger depot, and the same is to be done as soon as it reasonably can be by said railway company.

In order to further carry out the above plan it is necessary that petitioner should lay, or cause to be laid, certain additional tracks beyond that has already been defined as completion of existing double tracking on streets, and same are permitted and required to be laid by the mayor and aldermen of the city of Savannah, to wit:

50 *a.* On Tenth street a double track is to be laid from its intersection with Whitaker street extended to its intersection with Abercorn street.

b. On Abercorn street a double track is to be laid from its intersection with Tenth street, extended through Abercorn street northwardly to its intersection with Second street, in addition to which the double tracking will be completed on said Abercorn street, including squares to Bay street, as hereinbefore stated.

c. On Second street a track is to be laid from its intersection with Whitaker street to its intersection with Barnard street.

d. On Barnard street from its intersection with Second street, a track is to be laid extending through said Barnard street northwardly to Anderson street.

e. On Habersham street from Broughton street to St. Julian street a track is to be laid, connecting in the square with the present line on said last named street.

In the negotiations leading up to the adoption of the above mentioned plan this committee on behalf of the city insisted that the following specific things should be done by the railway company to wit:

a. On Barnard street and Second street where the said railway company is to lay track from Anderson street to Second street and along Second street to Whitaker street extended it is necessary to open up Barnard street and clear it of the obstructions now existing therein.

The mayor and aldermen of the city of Savannah is to purchase the land not already purchased on said Barnard street between Anderson and Second street so as to completely open the said street between the said points, and the said railway company is to pay to the city a sum of money equivalent to the amount necessary for said purpose, a proper allowance being made by the owner of the land obstructing said Barnard street in the way of frontage on Bull street to be allowed him by the city.

51 *b.* It becomes necessary in laying the double track of said railway company on Tenth street between Whitaker street extended and Abercorn street, to open said Tenth street between Whitaker street extended and Bull street. The mayor and aldermen of the city of Savannah will proceed to open said Tenth street between Whitaker street extended and Bull street, and it is required of the said railway company that it pay into the treasury of the city of Savannah a sum of money equivalent to one half of the amount expended for said purpose.

c. The said railway company is to procure from the City and Suburban Railway Company, which own certain land in Barnard street extended from Second street southwardly, amounting to twenty-nine thousand, nine hundred and sixty-three tenths square feet (29,960.3) a conveyance of the same to the mayor and aldermen of the city of Savannah, free of cost, as a part of Barnard street.

d. The said railway company, owning certain land in Bolton street, is to convey to the mayor and aldermen of the city of Savannah, so as to aid it in opening Bolton street eastwardly of the Savannah, Florida and Western railway tracks, all of the right, title, interest and estate of the said Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, in and to such lands in Bolton street, preserving, of course, the easement of the said street railway company over said land for its railway purposes.

e. It was deemed by the committee to be a matter of great im-

portance to the people of Savannah that Price street should be opened from one end to the other as a driveway, the same being a very narrow street, and upon which no railway track should be laid, and in view of the fact that the plan adopted by the committee affords ample street railway facilities to the residents of this section of the city, the committee insisted, as one of its conditions, that the railway company should remove its tracks from this street.

f. The fare to be charged from any point on said street railway system to any point on the same within the limits of the city of Savannah shall be five cents (5) for each passenger so conveyed upon a continuous passage, by day or by night, proper transfer or
52 transfers to be given such passengers at all intersecting points, this being intended to cover the said street railway system as composed of the lines of petitioner, as well as those of the City and Suburban Railway Company, and of any other lines which may be hereafter acquired or operated by said petitioner within the limits of the city of Savannah.

g. The said railway company is to procure from the City and Suburban Railway Company a conveyance to the mayor and aldermen of the city of Savannah, free of cost, of all the right, title, interest and estate of said last named railway company in and to that portion of Whitaker street which runs through the City and Suburban Railway stables property, lying between Second and Fourth streets, preserving, of course, the easement of the said railway company over said land for its railway purposes.

The railway company accepted these terms, upon the express condition, however, that, in consideration of all of the foregoing and of the benefits accruing to the mayor and aldermen of the city of Savannah — to the public, especially in the removal of the tracks from that portion of Price street extended from St. Julian street to Duffy street, at the instance and request of the city, should any other railway company desire to occupy said portion of Price street and the mayor and aldermen of the city of Savannah should grant permission to do so, such railway company shall pay to the mayor and aldermen of the city of Savannah six (6) dollars per running foot for so much of said portion of Price street as may be occupied by the tracks of the same, which sum of money shall be paid over by the mayor and aldermen of the city of Savannah to the said Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, its successors or assigns. The condition was considered by the committee as just and equitable and was agreed to as such.

Wherefore this committee recommends that the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, be authorized to readjust or cause to be readjusted the lines and tracks of said railway system, in accordance with the aforesaid plan, as adopted
53 by this committee, a map of which is filed with this report, and to that end the said railway company be required to take up and remove tracks from the streets or sections of the streets

which under said plan will be no longer needed for railroad purposes; to construct new tracks on the streets or sections of the streets as called for by said plan; to construct and complete the double tracking contemplated by said plan; to take up and remove, or cause to be taken up or removed, the turnouts and switches contemplated by said plan; to put in and construct such turnouts, curves and switches as may be required in perfecting said plan; and to make such other minor changes in the tracks of said system of street railroad as may be necessary to perfect the said plan; the entire work to be under the direction of the committee on streets and lanes and of the city engineer.

Before any steps shall be taken by the railway company towards putting said plan into operation the said company shall signify in writing to the mayor and aldermen of the city of Savannah its acceptance of the terms and conditions imposed upon it by this report, and shall, additionally, bind itself in a manner satisfactory to the city attorney that it will promptly and in good faith perform its several obligations in the premises. All the lines provided for in the foregoing plan shall be regularly operated upon reasonable schedule by said railway company, unless at any time the operation of any portion of the same shall be discontinued by authority of the mayor and aldermen of the city of Savannah.

T. J. DAVIS, *Chairman.*
W. F. REID, *Alderman.*
JOHN W. SMITH, *Alderman.*
S. KROUSKOFF, *Alderman.*
W. W. OWENS, *Alderman.*

The ayes and nays being called for, the vote resulted as follows: Ayes: Weil, Charlton, Davis, Reid, Owens, Krouskoff, Smith, Hull,—8. Nays: Guckenheimer, Wylly,—2.

This agreement entered into this — day of April in the year 1898, between the Mayor and Aldermen of Savannah and the Savannah, Thunderbolt & Isle of Hope Railway, a corporation of said State and county, witnesseth:

54 Whereas, heretofore, to wit, on November 4th, 1897, a contract was entered into by and between the above named parties, readjusting the lines of street railway in the city of Savannah; and

Whereas, it is mutually desired that said contract should be modified in certain particulars:

Therefore, in consideration of the increased facilities which will be furnished to the public by the removal of switches and dispensing with tracks in the streets hereinafter referred to, and the convenience to the said railway in operating its lines, it is mutually agreed by and between the Mayor and Aldermen of the City of Savannah, party of the first part, and the Savannah, Thunderbolt & Isle of Hope Railway, party of the second part, that said contract be

changed in the following respects, and to the following extent; and the provisions hereof shall be embodied in and become a part of said contract:

First. The railway company shall remove its switches or side tracks in Broughton street, and shall run a single straight track in place of the same, and shall pave with asphaltum the space outside of the rails where the pavement is removed, from end to end of the track in said street, including the space formerly occupied by switch or side track.

Second. The railway shall not remove its tracks from Duffy street, and shall not place a double track on Anderson street, nor in that southern portion of East Broad street where there is now only a single track, nor in that western portion of Bay street between Barnard and West Broad streets. The switches in Duffy street are to be taken out by the railway as soon as the guage is changed so that it can be operated in connection with Anderson street.

Third. The railway company shall extend its track on Duffy street to East Broad street, and connect it there by a suitable curve or curves with the track of East Broad.

Fourth. In all other respects, except as herein expressly provided, the said contract of November 4th, 1897, shall remain in full force.

55 Fifth. This agreement is made by the mayor and aldermen of Savannah in council assembled and by the board of directors of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah; the action of the said mayor and aldermen being evidenced by their public records and minutes, and that of the said railway being signified to the mayor and aldermen by the proper officer in writing under the seal of the said railway.

This agreement made between the Mayor and Aldermen of the City of Savannah, party of the first part, and the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., party of the second part, witnesseth:

That for and in consideration of the mutual convenience and advantage to the two parties above mentioned, the contract of November 4th, 1897, between them, readjusting the lines of street railway in Savannah, Ga., which has been subsequently modified, be and the same is hereby further modified and changed as hereinafter provided, and the terms of this agreement shall become a part of said contract of November 4th, 1897.

First. The line of railway of the City and Suburban Railway of Savannah, Ga., shall be extended southward on Barnard street, from Second street to Tenth street, and eastwardly through Tenth street from Barnard street to Whitaker street, to its intersection with the present line at that point and the right to lay down, construct, maintain and operate said railway through said streets as before stated is granted, subject to the control and regulation of the said

mayor and aldermen, the same as other lines or railway as provided in said contract of November 4th, 1897.

Second. The line of railway on Second street from Barnard to Whitaker shall be taken up and removed.

Third. In all other respects, except as herein expressly proviced, the said contract of November 4th, 1897, and modifications of the same heretofore made shall remain in full force.

Fourth. This agreement is made by the mayor and aldermen of Savannah in council assembled and by the board of directors
56 of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah; the action of the said mayor and aldermen being evidenced by their public records and minutes, and that of the said railway being signified to the said mayor and aldermen by the proper officer in writing under the seal of the said railway. Done this July 27th, 1898.

The petition of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., to the mayor and aldermen which ended in the contracts above set forth, dated June 29th, 1897, and attached to the contract.

1. The petition of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., respectfully shows:

That it is the owner of an extensive system of street and railway in and around the city of Savannah; that in addition to the lines originally owned by it, it has recently acquired and now operates the lines and franchises of what was formerly known as the Electric Railway Company of Savannah.

2. That for the purpose of operating its railway more economically and to better advantage and at the same time affording more adequate facilities to the public, your petitioner desires to readjust its several lines by removing, in some instances, portions of its present tracks and in other instances building certain additional and connection-, and by these means to establish a more complete system and one better adapted to existing and future requirements, and which while enabling this petitioner to handle its business with more ease and economy, will, in consequence thereof, also enable it to afford the public better accom-odation and service.

3. That in making such proposed changes, if permitted by council to do so, it will be incumbent on your petitioner to expend a large amount of money.

That it is the desire of your petitioner to confer with the municipal authorities looking to the consum-ation of an arrangement whereby the readjustment of its lines can be accomplished on such equitable terms and conditions as may be mutually satisfac-
57 tory and beneficial to all concerned, and to this end your petitioner respectfully prays that this application may be referred to a committee, which may be authorized to meet your petitioner and its counsel so as to formulate, subject to your approval, a

satisfactory arrangement in the premises between the city and petitioner.

Testimony of James H. Johnston.

I am president of the City and Suburban railway and treasurer of the Savannah, Thunderbolt & Isle of Hope railway. Under the contract of November 4th, 1897, about $10,000 was paid by the railroad company to the city. The railroad paid to the city about $7,000 to acquire a portion of Whitaker street. (Memorandum affidavit of witness, handed to him.) They paid $2,900 to the city for land they wanted. It shows in cash. Cash value probably would be a better term. They bought that land for the city. Barnard and Seventh streets, $7,288, is the next item. They conveyed on Barnard street about 17 or 19 feet in width and somewhere about five hundred feet in length. The value of it was $7,288. They also conveyed to the city a strip of land valued at $720.00. That was the whole width of the street I think, except what was necessary for tracks. The worth of the land was $10,908. I know of another railroad using streets in Savannah; the Central railroad. They use all of River street; they use a couple of thousand feet on Bay street; they use a portion of St. Julian street; and they use a part of Randolph street. The kind of business they do is transporting produce from their railroad terminus to these different places where they have side tracks. And then they haul things from one side of the city to the other on this track like the drays used to do. It is a local business altogether; all done within the corporate limits. They use a different style engine on these local tracks from the engine they use on the main line. They use on these tracks switch engines. They don't use passenger or freight engines on these local tracks; they use engines devoted to local business.

58 Cross-examination:

Q. The Central railroad is not a street railroad, is it?

A. It is a railroad on a street. If that is not a street railroad, I don't know what a street railroad is. The railroad I refer to was formerly the Central Railroad and Banking Company of Georgia, and is now the Central of Georgia Railway Company. I have never known it to charge for transporting passengers from one point in Savannah to another point in Savannah over the streets of Savannah. I never heard of their carrying passengers in Savannah. River street is used for local business entirely. They transport down River street freight that comes from the outside of Savannah; from points outside of Savannah. Freight that comes from other points to its depot, but they charge a local price for it. What I mean by a local price is, they charge for transporting goods from their regular depot to these various places on River street. All of it is freight which comes from points outside of the city of Savannah. They do

the business that drays used to do in former years. My affidavit shows correctly the different amounts paid by the railroad company under this contract. This is correct. That is my signature to that petition. That is the petition upon which the contract with the city was based. That petition started the negotiations. It was the basis of the arrangement. This petition sets forth, "That the Savannah, Thunderbolt & Isle of Hope railway shows that it is the owner of an extensive system of street and suburban railway in and around the city of Savannah; that in addition to the lines originally owned by it it has recently acquired and now operates the lines and franchises of what was formerly known as the Electric Railway Company of Savannah." That statement is correct. "Second, (reading from the petition) that for the purpose of operating its railway more economically and to better advantage and at the same time affording more adequate facilities to the public, your petitioner desires to readjust its several lines by removing, in some instances, portions of its present tracks and in other instances building certain additions and connections," etc. That was the purpose of this
59 arrangement. This money that the railroad paid was not exactly paid for lands that the city did not own and that the public did not own and which was necessary in order to carry out this plan of readjustment. The city desires these lands for the public; it was not necessary for any readjustment of our lines at all. In order to give us the lands that we desired and in order that we could pursue the course we desired, it was necessary for the city to condemn certain lands, and we agreed to make the city whole as to that and the railroad company paid for those condemnation proceedings for land between Second avenue and on Barnard and Anderson streets that is not down there. That was several thousand dollars. They are not in that memorandum showed me just now. This item in the affidavit (shown the witness by counsel) I understand is the value of lands on Barnard street that was given up to the city for the purpose of making the street wider. The Savannah, Thunderbolt & Isle of Hope railway and the City and Suburban railway paid to the city $2,900 in cash, and conveyed to the city land for Whitaker street and the east side of Barnard street. That was a strip of land between what is known as Third and Fourth streets, about 350 feet; then the other on Barnard street between Seventh and Eighth street, that is a little over 200 feet, that is the reason I said it was 16 or 19 feet wide by 500 feet. That was given to widen up that street.

Q. You say, Captain, that you paid to the city $2,900 in cash, and conveyed to the city land for Whitaker street, east side of Barnard street, and on Barnard valued at $7,288? Well now, is it not true that in order to give you the streets that you needed for this readjustment that it was necessary for the city to put itself to considerable expense to condemn the land for these streets?

A. We paid for it afterwards. We paid for all of it. We paid for what I told you. We paid in addition to that for streets that

were not opened. I am certain about that. I did not say that the city did not pay anything. That piece between Whitaker and Bull; you will recollect there is a piece there for which $3,300.00 or $3,400.00 was paid. We paid one-half of it. We paid also
60 one-half for another piece that I was telling about, between Whitaker and Anderson and Third streets. They are not in there. The Savannah, Thunderbolt & Isle of Hope railway runs the lines of the City and Suburban railway. It is under one management and under the name of the Savannah, Thunderbolt & Isle of Hope railway. I don't know of any other street railway in Savannah. The bulk of the income of our company is derived from the use of the streets of Savannah in the transportation of passengers in Savannah from one point in Savannah to another point. The Savannah, Thunderbolt and Isle of Hope railway has one million and a quarter in bonds and one million in stock. We have not managed to pay the interest on our bonds. We are behind in the neighborhood of forty thousand dollars. We have paid nothing on the stock. The interest not paid on the bonds amounts to between forty thousand and fifty thousand dollars in four years. The interest on the bonds is four per cent. and in four years we have run behind forty thousand or fifty thousand,—it might run sixty thousand,—I cannot tell exactly. This is an estimate. The interest ought to be paid quarterly. It is twelve thousand, five hundred dollars a quarter. I do not know what the bonds are worth on the market. I do not know what the market value is. There are two sets of bonds. There is a City and Suburban bond. You can get a quotation of that bond from the papers; they are worth over par. They amount to two hundred and fifty thousand. The balance are the bonds of the Savannah, Thunderbolt & Isle of Hope railway. I cannot say what is the gross income of these two roads. Can not give an estimate; have no idea. We manage to pay running expenses and part of the interest on the bonds. I think the City and Suburban bonds are worth above par. I could tell you what the gross income of the two roads is if I had known you were going to ask me that question; I could have been prepared. I did not know you were going to ask me that question. I can not give an estimate. I should say not less than one hundred and eighty thousand, and between that and probably two hundred thousand. I don't think it is over two hundred thousand
61 for last year. It has been increasing rather than diminishing. By gross income I mean without any deduction for betterments or running expenses or anything else. Not net. My idea is that it is between one hundred and eighty and two hundred thousand.

Re-direct examination:

The total mileage of the Central of Georgia railway in the streets of Savannah, I should say, is nearly five miles.

Re-cross examination:

When I said I estimated that we were behind in the payment of interest between forty and fifty thousand dollars, I meant up to the 1st of July, the first of this month. I believe the securities and stock are owned chiefly by one gentleman.

Charter of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga.

To all to whom these presents may come, Greeting:

Whereas, in pursuance of an act of the General Assembly of the State of Georgia, approved December 17th, 1892, and the amendments thereto, approved December 18th, 1894, and the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., the stockholders in the same being

James H. Johnston	Residence	Savannah, Ga.
Edward J. Thomas	"	"
Luke Carson	"	"
Charles S. Hardee	"	"
John N. Herrimann	"	New York, New York.
Henry Parsons	"	"
George Parsons	"	"
Pope Barrow	"	Savannah
Herman Myers	"	"
Jacob S. Collins	"	"
Jacob Paulsen	"	"
W. J. Lindsay	"	"
William Kehoe	"	"
G. G. Ely	"	"

having filed in the office of the secretary of state a certain petition seeking the formation of a corporation by adopting the provisions of the above stated acts, said corporation to be known as the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., with a capital stock of one million dollars ($1,000,000) for the purpose of constructing, equip-ing, maintaining and operating a railroad in Chatham county, Georgia, from Sandfly Station by way of
62 Thunderbolt to Savannah, and upon and along the following streets in the city of Savannah, namely, Bolton street, Habersham street, Broughton street, St. Julian street, Price street, Bryan street, Duffy street, Cemetery street, Robert street, South Broad street, now Oglethorpe avenue, Montgomery street, President street, and a line through the market, Gwinnett street, Ott street, Anderson street, Lovers lane, East Broad street, Bay street, West Broad street, Liberty street, Twelfth street, Estill avenue, the bridge over the right of way of the Savannah, Florida and Western railway, Randolph street, Indian street, West Boundary street, the

bridge across the Ogeechee canal at the Central Railroad wharves, Barnard street; and having complied with the statute in such cases made and provided, therefore the State of Georgia grants unto the above named persons, their successors and assigns, full authority, by and under the said name of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., to exercise the power and privilege of a corporation for the purpose above stated, subject to the provisions of article 4 of the constitution of this State and all the laws governing railroad companies of force at the date of this certificate, or that may hereafter become of force, either by constitutional or statute law or by any rules and regulations of the railroad commission of this State, or otherwise which govern and control the operation of railroads in this State.

And the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., having as aforesaid filed its petition to adopt the provisions of said act approved December 17th, 1892, and the said amendments approved December 18th, 1894, and all other amendments of said act, the said persons, the stockholders in the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., are a body corporate, with all the powers, duties, and liabilities of said act and the amendments thereto.

This charter to continue in force for one hundred and one years from this date.

In witness whereof these presents have been signed by the
63 secretary of state, and to which is annexed the great seal of the State at Atlanta, Georgia, this fourth day of June, 1897.

[Great Seal of the State of Georgia.]

A. D. CANDLER,
Sec. of State, State of Ga.

By agreement of counsel the following statement of facts was admitted as evidence: The mileage of the City & Suburban Railway of Savannah, Ga., and of the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., in the city of Savannah, which was in use, amounted to nineteen miles (19), and that the Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga., and the City & Suburban Railway of Savannah, Ga., mileage combined should be treated as one for the purpose of this case, and no objection to be made on account of the fact that the City & Suburban railway technically was owner of part of the nineteen miles (19), it being desired that the case should be decided upon its merits. The two companies are operated by the same management and control. The tax ordinance, so far as it related to the tax question on street railroad companies, and the amendment thereto, are correctly copied in paragraph one (1) of the first amendment to the plaintiff's petition and in paragraph two (2) of the defendant's answer. The execution issued for a specific tax and this tax was among the specific taxes mentioned in the tax ordinance referred to in the pleadings. For

the purposes of this case the mileage of the City & Suburban railway and of the Savannah, Thunderbolt & Isle of Hope railway is to be treated as one, the same as if it all belonged to the Savannah, Thunderbolt & Isle of Hope railway, the controlling and operating road, and that the charge for the privilege of using the streets may be made against one for both.

Endorsements on the back: In the superior court of Chatham Co., Ga. June term, 1901. The Sav'h, Thunderbolt & Isle of Hope Ry. of Sav'h *vs.* The Mayor and Aldermen of Sav'h. Motion for new trial. Brief of evidence filed in office July 20th, 1901. James K. P. Carr, clerk, S. C. C. C.

The hearing of this motion is continued subject to be called
64 up at any time on one day's notice. July 27th, 1901. R. Falligant, judge.

The grounds of motion for new trial approved. Sav'h Ga. August 10, 1901. R. Falligant, judge.

The within brief of the evidence on the motion for a new trial in the case of The Savannah, Thunderbolt & Isle of Hope Rwy. *vs.* The Mayor & Aldermen of Savannah is approved. August 10, 1901. R. Falligant, judge, E. J. C. of Geo.

Order Refusing a New Trial.

The within motion for a new trial having been regularly continued until this day, and being now called up in its order, after consideration of the same, it is ordered and adjudged that the motion be denied and a new trial refused. In open court. Aug. 10, 1901.

R. FALLIGANT,
Judge E. J. C. of Geo.

GEORGIA,
Chatham County.

Clerk's office, superior court.

I, James K. P. Carr, clerk of said superior court, do hereby certify the above and foregoing fifty-nine pages in typewriting to be true and correct copies of such parts of the original record on file in this office as are specified in the bill of exceptions as necessary to be transmitted to the supreme court of Georgia in the case of The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Ga. *vs.* The Mayor and Aldermen of Savannah.

In testimony whereof, I have hereunto set my official signature and affixed the seal of said court this 24 day of August, 1901.

[SEAL.] JAMES K. P. CARR,
Clerk Superior Court, Chatham County, Geo.

Indorsed on back: No. 14 Eastern. October term, 1901. S. T. & I. H. Ry. *v.* Mayor etc. of Savannah. Transcript. Filed in office Aug. 26, 1901. Logan Bleckley, D. C. S. C. Ga.

SAVANNAH, THUNDERBOLT AND ISLE OF HOPE RAILWAY
v.
65 MAYOR AND ALDERMEN OF SAVANNAH.

By the COURT: A judgment denying an interlocutory injunction, when the same depends entirely upon questions of law, is, upon its affirmance by the supreme court, conclusive against the plaintiff in error as to every such question made by his assignments of error, though there be no express reference to all of them, either in the opinion filed or in the synopsis of the points decided.

Submitted March 1, decided April 2, 1902.

FISH, *J.*:

The Savannah, Thunderbolt and Isle of Hope Railway filed, in the superior court of Chatham county, an equitable petition against the mayor and aldermen of the city of Savannah, praying that the defendants be enjoined from collecting from the plaintiff a business or privilege tax levied by the municipal authorities upon street-railway companies doing business within the limits of the city, alleging that the city had no power or authority in law to levy such a tax. In an amendment to the petition it was alleged: "All railroad companies stand upon the same footing, as regards taxation. The said mayor and aldermen of Savannah have discriminated against your petitioner and the City and Suburban Railway of Savannah, Ga., in that they have not imposed this tax upon any other railroad company doing business in Savannah, although there are other railroad companies who do business in the city, and use the streets of the city by consent of the mayor and aldermen." It appears from the record in this case when it was here before that, upon an interlocutory hearing, the affidavit of H. M. Lofton was put in evidence by the plaintiff. A part of this affidavit was as follows: "That the Central of Georgia Railroad is now and has been for years using some of the streets of Savannah, particularly River street, by laying down its tracks longitudinally thereon, and operating its trains upon it, by consent of the mayor and aldermen of the city of Savannah. This deponent is informed and believes that
66 no attempt has been made to impose any tax upon said Central of Georgia Railway for the privilege of using said streets. They use nearly a mile of River street with their railway track laid longitudinally thereon." The court refused to grant an interlocutory injunction. The plaintiff sued out a writ of error to this court, assigning error upon such refusal, and the judgment of the lower court was affirmed. 112 Ga. 164. Afterwards the case came on for final trial before a jury, on the same pleadings. Lofton was intro-

duced as a witness by the plaintiff, and his testimony was, in substance, the same as that contained in his affidavit submitted upon the interlocutory hearing. Johnson, a witness for the plaintiff, testified, in substance, that the Central Railroad used all of River street and parts of Bay, St. Julian and Randolph streets, in transporting produce from the terminus of such railroad to places where it had side-tracks, hauling produce from one side of the city to the other, like drays formerly did; that it was a local business altogether, and done within the corporate limits, a different engine being used on these local tracks from the engine used on the main line; freight thus hauled being that which came from other points outside of the city of Savannah to its main depot, but local prices being charged for transporting it from the regular depot to various places on River street. The fact that the Central of Georgia Railway used a part of River street as stated in Lofton's affidavit, which was used on the interlocutory hearing, was not controverted upon that hearing, nor was his testimony, or that of Johnson, upon the final trial, in reference to the use of the streets of the city by that railroad company, contradicted. There was no issue of fact on that question made at either trial. Upon the final trial the court directed a verdict for the defendants. The plaintiff made a motion for a new trial, which being overruled, it excepted, and the case is now before this court for the second time.

One of the grounds of the motion for a new trial was, that the verdict was erroneous, because the tax in question was not uniform; and counsel for the plaintiff in error in his brief, says:

67 "The only question left open by the previous decision of this court was the contention of the plaintiff in error that the tax in question violated the rule requiring uniformity, prescribed by the constitution in § 5883 of the Code. It now appears that there is another railroad company doing a purely local business in the streets of Savannah which is not taxed when the plaintiff in error is taxed." He says further: "This question was not clearly made when the case was here before, and was not passed upon by the court." We can not concede the correctness of the contention of counsel in this respect; for we think the question as to the uniformity of the tax was made when the case was here before, and that the decision of this court then rendered in the case is *res adjudicata* as to that matter. The question was made by the pleadings and uncontradicted evidence before the judge at the interlocutory hearing, and he certainly passed upon it, as one of the legal points in the case, in refusing the interlocutory injunction. When the plaintiff assigned error upon that ruling and brought the same here for review, the question was before this court for determination, and it being purely a question of law, no issue of fact being involved, the judgment of affirmance rendered by this court brings the case squarely within the ruling made in City of Atlanta *v.* First Methodist Church, 83 Ga. 448, to the effect, that a judgment of a trial court, granting or refusing an injunction, when the same depends entirely upon a ques-

tion of law, is, upon its affirmance by the supreme court, a final adjudication of such question; which decision, upon a review thereof, was adhered to in Ingram *v.* Mercer University, 102 Ga. 226, where a number of the adjudications of this court are cited in support of the proposition. The rule was again recognized in Murphey *v.* Harker, 115 Ga. 77. If a plaintiff in error makes a question by his assignment of error, he is concluded by an affirmance by the supreme court of the judgment below, although the question be not expressly mentioned, either in the written synopsis of the points decided, or in the opinion filed, in the case. See McWilliams *v.* Walthall, 77 Ga. 7. It follows that the judgment below must be affirmed.

Judgment affirmed. All the justices concurring, except Little and Lewis, JJ., absent on account of sickness.

68 Supreme Court of the State of Georgia.

ATLANTA, GA., *April* 2, 1902.

The honorable supreme court met pursuant to adjournment. The following judgment was rendered:

SAVANNAH, THUNDERBOLT & ISLE OF HOPE RY.
versus
MAYOR, ETC., OF SAVANNAH.

This case came before this court upon a writ of error from the superior court of Chatham county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed, all the justices concurring except Little and Lewis, JJ., absent on account of sickness.

Bill of costs, $10.00.

69 ATLANTA, GA., *April* 19, 1904.

Clerk's office, supreme court of Georgia.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with true and correct copies of the petition for writ of error, bond, assignment of errors, bill of exceptions, transcript of record, and of the opinion and judgment of said supreme court, constituting the entire record in the case of The Savannah, Thunderbolt & Isle of Hope Railway of Savannah, Georgia, *versus* The Mayor and Aldermen of the City of Savannah, as appears from the records and files of this office.

[Seal Supreme Court of the State of Georgia.]

Z. D. HARRISON, *Clerk.*

Endorsed on cover: File No. 19,318. Georgia supreme court. Term No. 238. The Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, plaintiff in error, *vs.* The Mayor & Aldermen of the City of Savannah. Filed May 2nd, 1904. File No. 19,318.

Supreme Court of the United States.

OCTOBER TERM, 1904.

Number 238.

THE SAVANNAH THUNDERBOLT AND ISLE OF HOPE RAILWAY OF SAVANNAH, GEORGIA,
Plaintiff in Error,

v.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
Defendant in Error.

Brief of the Plaintiff in Error.

STATEMENT OF CASE.

The Savannah Thunderbolt and Isle of Hope Railway and the City and Suburban Railway are railways operated by electricity in the city of Savannah, Georgia, with lines extending outside of the city to suburban points. The Savannah Thunderbolt and Isle of Hope Railway and the City and Suburban Railway have an aggregate mileage in Chatham County outside of Savannah of 15 miles and an aggregate mileage within the corporate limits of Savannah of 20 miles. Of the latter 1 mile of track is not used (Printed Record, pp. 32 and 33). For the purposes of this case by agreement of the parties both of these railways are considered as the Savannah Thunderbolt and Isle of Hope Railway (Printed Record, p. 47 and 48).

Every year in accordance with law the plaintiff in error returned its property to the Comptroller-General for State,

county and municipal taxes. The taxes were regularly paid. The year 1899 the taxes paid amounted to over $6,000 (Printed Record, pp. 33 and 34).

On November 4, 1897, the city of Savannah and the Savannah Thunderbolt and Isle of Hope Railway entered into a contract for the purpose of requiring the railway to afford "better accommodation and service to the public" (Printed Record, pp. 21 and 22), and "for the benefit of the public" (Printed Record, p. 24, III). This contract was subsequently amended in April, 1898 (Printed Record, pp. 27 and 28). The purpose and intention of this contract was to grant to the plaintiff in error the use of the streets in consideration of the numerous benefits accruing to the public and by the express terms of this contract for the valuable considerations, in land and money, the easement for railway purposes in the streets named therein was "granted" to the railway (Printed Record, p. 28, par. 1). The consideration moving to the city was paid, the contract executed by the plaintiff in error, and the streets in use by the railway and involved in this case are those mentioned in that contract. Under this contract the railways paid to the city of Savannah in land and money over $10,000 (Printed Record, p. 43). By the terms of this contract the railway company conveyed to the city of Savannah certain land in Bolton Street, a street in the city of Savannah, to enable the city of Savannah to open Bolton Street eastwardly and specifically reserved the easement in Bolton Street for its railway purposes (Printed Record, p. 38, par. *d*). Under the same contract a portion of Whitaker Street owned by the railway company was conveyed to the city with the specific reservation of the easement of said railway company to use said street for its railway purposes (Printed Record, p. 39, par. *g*).

On December 28, 1898, the Mayor and Aldermen of the city of Savannah passed a tax ordinance for the pur-

pose of raising revenue for the year 1899. Among other taxes laid in this ordinance was one for $100 for each mile or fraction of a mile of track of railways in the city of Savannah. The ordinance is as follows:

"Street Railroad Companies whether under the control of another company or not shall pay $100 per mile or fraction of a mile of track and in addition thereto $25 for each and every car at any time used by said company in the city * * *" (Printed Record, p. 16.)

On the 22d of March, 1899, the foregoing ordinance was amended as follows:

"An ordinance to amend that part of the tax ordinance passed December 28, 1899, relating to Street Railway Companies, to be found on page 11 of the pamphlet containing the city tax ordinances." "Sec. 1. Be it enacted by the Mayor and Aldermen of the city of Savannah in Council assembled, that for the purpose of expressing more clearly the intent of council, the words on page 11 of the pamphlet containing the above mentioned tax ordinances, 'street railroad companies whether under the control of another company or not, shall pay $100 per mile or fraction of a mile of track,' be and the same are hereby so amended that hereafter they shall read as follows: 'Street railroad companies whether under the control of another company or not, in lieu of the specific taxes heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city, and *for the use of the streets of the city* [italics ours] at the rate of $100 per mile or *fraction of a mile of track* used in the city of Savannah by said railroad company. And it shall be the duty of the street railroad company to make a return under oath through their proper official of the amount of their trackage in the city of Savannah.'" (Printed Record, p. 16.)

As there was one mile of track in the city not in use by the plaintiff in error, the taxes under this amended ordinance amounted to $1,900.

Plaintiff in error refused to pay these taxes, execution was issued and levied upon its cars. Thereupon plaintiff in error filed its petition in the Superior Court of the Eastern Judicial Circuit of Georgia and the judge of that court on the 19th day of August, 1899, granted a temporary restraining order temporarily prohibiting the collection of the taxes (Printed Record, pp. 9, 10 and 11). On October 28, 1899, the defendant in error filed its answer to the rule to show cause (Printed Record, p. 12). On December 11, 1899, defendant in error filed its answer to the petition (Printed Record, pp. 13, 14 and 15). On January 5, 1900, the plaintiff in error filed two amendments to its petition (Printed Record, pp. 16, 17, 18, 19, 20 to 29). By the first amendment it was expressly alleged that the tax ordinance discriminated unjustly against the plaintiff in error "in that they have not imposed this tax upon any other railroad company doing business in the city of Savannah and using the streets of the city" (Printed Record, p. 17). This amendment also sets up the impairment of the obligation of the contract of 1897 (Printed Record, pp. 18 and 19). The second amendment sets up more specifically the impairment of the obligation of this contract and alleged that the ordinance was an attempt to take plaintiff in error's property without due process of law (Printed Record, pages 20 and 21). On February 19, 1900, upon an interlocutory hearing the temporary restraining order was dissolved and the temporary injunction prayed for by the plaintiff in error denied (Printed Record, p. 29). To this rule of the court the plaintiff in error excepted and issued its writ of error to the Supreme Court of Georgia. The case was argued in that court on March 21, 1900, by order of that court reargued on July 17, 1900, and decided November 26, 1900. The decision of the lower court was affirmed. The following is the opinion rendered by the

Supreme Court of the State of Georgia, as reported 112 Georgia, 164:

"*Savannah, Thunderbolt and Isle of Hope Railway* v. *Mayor and Aldermen of Savannah.*

"The municipal authorities of the city of Savannah had power, under the charter of the city and the second proviso of section 2180 of the Civil Code, to levy and collect an occupation or business tax from street railroad companies for the use and occupation of the city streets by their tracks and cars, when such companies' principal business was the transportation of passengers from points within the city limits to other like points.

"The facts of this case differ from those of the case of *City Council of Augusta* v. *Central Railroad*, 78 Ga. 1191.

"Argued March 21, Reargued July 17—Decided November 26, 1900.

"Petition for injunction. Before Judge Falligant. Chatham Superior Court. February 19, 1900.

"Barrow & Barrow and Joseph B. Cumming, for plaintiff.

"Samuel B. Adams, for defendant.

"SIMMONS, C. J. The municipal authorities of the city of Savannah by a proper ordinance, levied a business or privilege tax upon street-railroad companies doing business within the limits of the city. The plaintiff below, being such a company, filed an equitable petition against the municipal authorities, alleging that the city had no power or authority to levy such taxes, and that the same were therefore illegal and void. Upon the hearing the judge refused the injunction, and the petitioner excepted.

"The charter of the city of Savannah contains the following clause: 'They (the municipal authorities) are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said city, * * * and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience, and advantage of said city, and may enforce the payment of such assessments and taxes in such manner as said mayor and aldermen may prescribe.' Code of 1882, § 4847.

This is about as broad a power as the English language can express to tax business and occupations. There can be no doubt that the city authorities had the power to impose the tax here complained of, unless the decision in the case of the *City Council of Augusta* v. *Central Railroad*, 78 Ga. 119, rules to the contrary. It is claimed by the plaintiff in error that as street-railroads were, by the act of 1889 (Acts 1889, p. 36), put under the same tax act as steam and commercial railroads, they were brought within the construction put upon the tax act of 1874 in the *Augusta* case. It is claimed that under that case, the municipal authorities had no power to levy or collect an occupation tax upon street-railroad companies; that the charter of the city of Augusta contained substantially the same provisions as to the taxation of occupations as does that of the city of Savannah; and that when this court decided that the municipal authorities of Augusta had no authority to levy a business tax upon the Central Railroad and the other two railroad companies involved in that case, the question was closed so far as concerns the right of the city to impose an occupation tax upon the railroad company. We do not agree with this contention. The opinion in the *Augusta* case, which is the decision of the court, shows that the ruling made applied only to what may be termed a commercial railroad company,—one whose general business is not carried on within the city. The State, by the act of 1874, reserved the exclusive right to collect taxes from railroad companies on the property owned and used in connection with their business, and a city had no authority to impose a tax upon such property. Nor could a city, under the case just cited, impose a business or occupation tax on a railroad company which, under authority of its charter, merely transported freight and passengers to and from the city; for such a tax could be used to work a practical repeal to the charter of the company. Where, however, a street-railroad company does not transport freight or passengers to and from the city as the beginning or end of the route, but engages in transportation from one point within the city to another within the city, it enters into a general business within the city and is properly taxable

by the municipality. And so if a street-railroad company combine the two businesses, as was done by the company in the present case, so as to transport freight or passengers from the city to points beyond or from such points to a point within the city, and also to transport freight or passengers from one part of the city to another, then such company, though it might not be subject to a city tax on its extra-municipal business, may be taxed by the city no the business carried on exclusively within the city limits. This principle was recognized in the *Augusta* case; for it is there stated that "if a railroad company, which is a corporation, should carry on a business in the city of Augusta such as warehouseman, broker, drayage, or commission business, etc., it would be liable to be taxed as any other person carrying on a like business." It is argued that one of the railroad companies declared in the *Augusta* case to be exempt had in this State but one or two miles of track, nearly all of which lay within the city of Augusta. Conceding this to be true, the case is still vastly different from the present one; for the company in question was engaged in transportation to and from Augusta and points in an adjoining State, and did not enter into the business of transporting freight or passengers from any point within Augusta's limits to any other such point.

"In the present case the record discloses that the street-railroad company actually occupies with its cars and tracks the streets of the city of Savannah, and that it transports passengers from point to point within the city and charges toll therefor. It occupies and uses the streets as much as any hack or omnibus line would do—indeed much more. It is well settled that the city has authority to charge these latter companies for the privilege of carrying on their businesses within its limits, and we see no reason why a street-railroad company should be held to stand upon a different footing. It was argued by counsel for plaintiff in error, that while the power given to the city to tax occupations was very broad, it was not universal; that inasmuch as the State itself had never levied a business tax upon railroad companies, it was not the intention, in granting the charter of the city of Savannah,

to give the city authorities power to levy such a tax. In reply to this argument it is sufficient to say that there are a great many businesses and occupations upon which the State has never levied a business tax but which are nevertheless taxable by cities. Thus the State has never levied a business tax upon merchants, blacksmiths, those who run omnibus or hack lines, or those in various other occupations which might be mentioned; yet, under the authority given to municipalities to impose occupation taxes, such taxes have been generally, we might almost say universally, levied upon all businesses within the municipal limits. While the taxation of street-railroad companies may not have been in the mind of the legislature when it granted to the city of Savannah 'full power and authority to make such assessments and lay such taxes on the inhabitants of said city, * * * and those who transact or offer to transact business therein,' the power granted is amply sufficient to cover such taxation. We suppose that when this charter was granted to the city of Savannah, there were no such companies in this country as the present plaintiff in error, but the power given is sufficient to embrace any new business or occupation that might arise in the rapid commercial and business growth of the country. Admitting for the sake of the argument the soundness of the plaintiff's contention as to the force and effect of the *Augusta* case, 78 Ga. 119, we would still hold that under the Act of 1894 (now § 2180 of the Civil Code) the city authorities had power to levy an occupation or privilege tax upon this plaintiff in error. The record discloses that the company was incorporated under the Act just cited. In the act and in the Code Section is a proviso which declares that all street-railroad companies incorporated thereunder 'shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time.' As before remarked, the charter of the city gives it ample power to levy and collect a tax upon the business of street-railroad companies. The tax is therefore within the terms 'assessment and other lawful burdens' imposed upon them. In the case of *Home*

Insurance Company v. *Augusta*, 50 Ga. 530, this court, in discussing a provision of the charter of the city of Augusta which authorized the municipality 'to make such assessments on the inhabitants of Augusta or those who hold taxable property within the same as may seem expedient,' said: What is the meaning of the word 'assessments on the inhabitants'? it certainly authorizes a tax on property. Is it limited to that? If so, why? Businesses, occupations, and professions are as equally the subject of taxation as property, and have been as regularly taxed as any real or personal property. Cooley's Const. Lim. 479. If the assessment is not limited to the person, such as a capitation or poll tax, what is there to confine it to any one subject matter of taxation? It has always been the rule of the legislature of this State to assess a tax on property, on business, and also a capitation tax; and when taxation is referred to, the power to make assessments includes the power to assess all three, unless there be some other provision to limit it. If it does not extend to the power to levy a tax on business, etc., then it would, in this case, be restricted altogether to property. See also, *Wells* v. *Savannah*, 107 Ga. 4; *Mutual Reserve Association* v. *Augusta*, 109 Ga. 73. For these reasons we think that when the legislature extended to street-railroads the method of taxation which had theretofore been applied to commercial railroads, and, at a time subsequent to that of the decision in the *Augusta* case, inserted the above quoted proviso as to liability to assessments and other lawful burdens, this was a modification of that decision, or a refusal to extend it to street-railroads, even if the decision could otherwise be held to embrace them.

"After much reflection and study of this important case, we have come to the conclusion that there was no error in holding that street-railroad companies are liable under the law for the business tax imposed by the city, and that there was no error in refusing the injunction.

"Judgment affirmed. All the Justices concurring."

In rendering this decision the Supreme Court of the State of Georgia completely ignored the Federal questions involved in this case and based their decision solely upon

the State question as to whether or not there was any authority under the laws of Georgia for a municipality to impose a tax on a railroad corporation for doing business within the corporate limits and this was done, although the Federal question was separate and distinct from the State question, and remained in the case in spite of the adverse decision to the contentions of the plaintiff in error upon the State question.

Afterwards, on July 12, 1901, the case came on for final trial, before a jury in the lower court on the same pleadings. The brief of the evidence introduced on this trial is set forth in the printed record, pages 32 to 48. The evidence showed that the Central of Ga. Ry. Co. was using five miles of the streets of the city of Savannah in doing a purely local business within the city (Printed Record, pp. 33, 43 and 45, bottom).

The above decision of the Supreme Court of Georgia decided nothing except that under the laws of Georgia the city of Savannah could impose a tax on railroad corporations when they carried on a business solely within the corporate limits, and left the other questions relative to the illegality of the ordinance to be determined on the final hearing. Under direction from the court the jury found a verdict for the defendant in error, upon which judgment was returned on the same date by the court for the defendant in error (Printed Record, p. 30). On July 19, 1901, the plaintiff in error filed its motion for a new trial in which all of the Federal questions now urged were set forth (Printed Record, pp. 31 and 32). On August 10, 1901, a new trial was refused (Printed Record, p. 48). The plaintiff in error excepted to the judgment refusing to grant the new trial by its bill of exception filed in the lower court August 15, 1901, and in the Supreme Court of the State of Georgia, August 26, 1901 (Printed Record, pp. 6, 7, 8 and 9). The case was sub-

mitted to the Supreme Court of Georgia on March 1, 1902, and its decision rendered April 2, 1902, affirming the judgment of the lower court (Printed Record, pp. 49, 50 and 51). Again the Supreme Court of Georgia ignored the Federal questions involved in the case. On April 1, 1904, the plaintiff in error filed its petition for a writ of error to the Supreme Court of the State of Georgia, which was on that date allowed by the Chief Justice and filed in the office of the clerk of the Supreme Court of Georgia (Printed Record, pp. 1, 2 and 3).

ASSIGNMENT OF ERRORS.

The assignment of errors filed by the plaintiff in error and now urged are as follows:

I.

The court erred in sustaining said tax ordinance for the reason that said tax ordinance is repugnant to the fourteenth amendment of the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws, by being an arbitrary classification by the taxing power and being a discrimination against the said plaintiff, in that it did not apply to other persons similarly situated and using the streets under like conditions.

II.

The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it was void, because it impaired the obligation of the contract between the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, and the mayor and aldermen of the city of Savannah made November 4, 1897, and amended in April and July, 1898, set forth in the record.

III.

The court erred in refusing to hold and decide that the said tax ordinance of the mayor and aldermen of the city of Savannah was an authority exercised under the State of Georgia and was void upon the ground that it was repugnant to that clause of the Constitution of the United States which prohibits any State from impairing the obligation of a contract.

IV.

The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it included Whitaker and Bolton Streets, the land for which had in part been conveyed to the mayor and aldermen by the railway for the purposes of streets, and at the same time the easement for railroad purposes over said land was expressly reserved to the railway, this being done by contract with the mayor and aldermen, the obligation of which contract, the plaintiff contends, the ordinance impairs.

BRIEF.

First Assignment of Error.

"The court erred in sustaining said tax ordinance for the reason that said tax ordinance is repugnant to the fourteenth amendment of the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws, by being an arbitrary classification by the taxing power and being a discrimination against the said plaintiff, in that it did not apply to other persons similarly situated and using the streets under like conditions."

This tax is imposed on the plaintiff in error because it does business in the city of Savannah, and "for the use of the streets of the city" in doing this business. The plaintiff in error's railway is not confined to the city

limits, in which it uses 19 miles of streets, but extends 15 miles outside of the city of Savannah. The Central of Georgia Railway Company, a steam railroad, is engaged in business within the corporate limits of the city of Savannah and in carrying on their business use all of River Street, and portions of Bay Street, St. Julian Street and Randolph Street (Printed Record, page 43). They use a total of 5 miles of the streets of the city of Savannah (Printed Record, page 45). Their lines also extend outside of the city of Savannah. The business carried on by the plaintiff in error and the business carried on by the Central of Ga. R. R. Co. are both local, that is to say both are for transportation from one point within the city limits to another point within the city limits (Printed Record, page 43). Absolutely the only differences between the two are that plaintiff in error operates by electricity and in the business done in the city of Savannah transports freight and passengers while the Central of Ga. R. R. Co. operates by steam and in the business done in the city of Savannah transports freight.

We contend that the difference between these two corporations is not sufficient to justify a classification which puts the electric railway in one class and imposes a burden on it of $1,900 per annum and puts the commercial railway in a separate class and exempts it from any tax. The tax ordinance defines the class on which this burden is to be imposed and shows on the face of it that the tax is imposed not for a particular business done but for a special privilege granted.

This court will recognize the definition of the class as contained in the taxing act and the classification must be justified under such definition.

Magoun v. *Ill. Trust & Savings Bank*, 170 U. S. 283, 296.

Pacific Express Co. v. *Seibert*, 142 U. S. 339.

We contend that it is apparent from the definition of the class to be taxed that such class is not to be determined by any particular business carried on, but is to be determined by the question of whether or not the special privileges are enjoyed. The tax is not imposed for the privilege of doing business of transporting passengers or freight or freight and passengers or for doing any particular kind of business. It is necessary in order to give the taxing power jurisdiction that a local business be done, but whether or not a particular person falls within the class established is determined not by the business done but by the privileges enjoyed. Subjection of the person to the taxing power depends upon his doing business within their jurisdiction. Subjection of such business to the tax depends upon his using the streets in doing such business. In other words, a railroad not doing a local business but using the streets would not be subject to the tax for the reason that the taxing power would have no jurisdiction to impose the tax. And likewise, a railroad doing a local business but not using the streets would not be subject for the reason that it would not enjoy the privileges for which the tax was imposed. But a railroad which does a local business, and thereby subjects itself to the taxing power of the municipality, and in doing this business uses the streets, and thereby enjoys the privileges granted, is subject to this tax. Our Supreme Court in passing on this case has shown clearly that no distinction is to be made between an electric railroad and a commercial railroad if they both do a local business.

See decision in statement of case, *Savannah Thunderbolt and Isle of Hope Ry.* v. *Mayor and Aldermen of the City of Savannah*, 112 Ga. 164; *City Council of Augusta* v. *Central of Ga. R. R.* 78 Ga. 119.

It follows therefore, that the material question to be

considered, in determining whether these two corporations are of the same class, is whether the two corporations doing business in the city use the streets of the city. The burden is imposed for this privilege. Membership in the class is determined by the enjoyment of this privilege. It is for occupying the streets with their tracks that they are required to pay. In other words, they have based their classification not upon the particular business carried on but upon the privileges granted. This appears not only from the express language in the ordinance "for the use of the streets in the city" as well as when they fix the rate of the tax at $100 per mile or fraction of a mile "of track used," but by the failure of the ordinance to define the class as those doing a particular business.

Where the classification is based not upon the kind of business carried on, but upon the special privileges granted, it must appear in order to sustain the classification that the enjoyment of the privileges places the person taxed in a separate and distinct class by reason of such privilege. The taxing power can not base its classification on the privilege granted and impose a burden therefor without going further and seeing to it that no one is omitted from the burden, whatever their business may be or they may be called, who enjoy the same privileges.

Gulf Colorado & Santa Fe Ry. v. *Ellis*, 165 U. S. 150, 157.

Merchants and Manufacturers Bank v. *Pennsylvania*, 167 U. S. 461, 465.

The learned justice rendering the opinion in the case of *Gulf Colorado & Santa Fe Ry.* v. *Ellis* on page 157 in his discussion of this principle, and in reply to the argument that the penalty imposed upon the railroads under certain conditions, as set forth in that case, could be justified upon the ground that special privileges had been

granted the corporations, says: "It is sufficient answer to say that the penalty is not imposed on all corporations. The burden does not go with the privilege; only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored."

He goes further and in answer to the suggestion of possible distinction between corporation privileges or possible classification between corporations as such and says: "Further, the penalty is imposed not upon all corporations charged with the quasi public duty of transportation, but only those charged with a particular form of that duty, so the classification is not based on any idea of special privilege by way of incorporation nor of special privilege given thereby for the purpose of private gain nor even of such privileges granted for the discharge of one general class of public duties." Recognizing the distinction in the nature of the privilege under discussion in that case and the privilege involved in the case at bar, we nevertheless earnestly contend that the principle so clearly illustrated by the decision in that case is most applicable to the case at bar. The taxing power here has imposed a burden on railways coming within their jurisdiction by doing a local business because they use the streets. But when they arbitrarily select electric railways; when they impose it solely on electric railways; when they put electric railways enjoying this privilege in a class to themselves and exempt steam railways enjoying exactly the same privileges, then "the burden does not go with the privilege; only (electric) railroads of all corporations are selected to bear this penalty; the rule of equality is ignored." They have failed to treat all persons "alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

Hayes v. *Missouri*, 120 U. S. 68, 71.
Soon Hung v. *Crowley*, 113 U. S. 703, 709.
Billings v. *Illinois*, 188 U. S. 97.

The contentions of the plaintiff in error in this assignment of error could not be more clearly stated than in the language of Mr. Justice Lamar in the opinion of the court in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339. He says (p. 352):

"The contention of the complainant, however, in this connection is that the rule of uniformity and equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed in the act, imposing upon certain persons or associations a tax from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt. In other words, the contention is that the act of the legislature arbitrarily defines what shall constitute an express company and then lays a tax upon its business, while at the same time it permits the same kind of business to be done by any person or company not embraced within the class just defined without being subject to any tax at all."

While it is true that in that case the classification was based on the difference in business done and the definition was of a particular business—and in the case at bar our contention is that the business done does not define the class, yet no stronger argument can be used in favor of the contention, now made in the case at bar, of this tax being an unreasonable and arbitrary selection, than the reasons given by the learned justice in sustaining the classification. The act imposed a tax on express companies defined by the act as those carrying on the business of transportation under contracts for hire with railroad or steamboat companies. The act was not enforced against railroad or steamboat companies or other companies which owned their own means of transportation. The court said that there was an essential difference between express companies as defined by the act and other corporations owning their own means of transportation,

and based this determination on the fact that railroad companies owning their own means of transportation were taxed on many kinds of tangible property while the express companies, as defined by the act, had no tangible property subject to taxation. It was said that "this distinction clearly places the express company defined by this act in a separate class from companies owning their own means of transportation." The case is a clear illustration of what is meant by a reasonable difference justifying a classification of corporations.

The same decision recognizes the principle of law that in determining the question as to whether two persons are of the same class for the purpose of taxation, the policy of the taxing power in the treatment of the two persons with regard to other matters is to be considered; whether they are treated alike for the purpose of other taxation and whether they are dealt with by the taxing power in other respects and under other laws as persons of the same class. It is said:

"* * * Such company being so entirely dissimilar in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like, owning a large amount of tangible and other property subject to taxation under other and different laws, and upon other and different principles, we do not see how, * * * it can be held violative of the 14th amendment of the Constitution. * * * "

Id. page 354.

In this connection, we call the court's attention to the policy of the State of Georgia in this respect. The plaintiff in error and the Central of Ga. R. R. Co. are treated by the State of Georgia as persons of the same class absolutely in every respect. They are incorporated under the same law (Civil Code of Ga. 1895, § 2180). They are placed in the same class for the purpose of State taxation and the

same forms and rules with regard to returning their property for State, county and municipal taxation applies alike to both (Ga. Laws, Act of 1889, page 36). They are both regulated by the State Railroad Commission. The same rule of law as to diligence and the law relative to the presumption of negligence applies alike to each. The same law excepting them from the rule of common law with regard to negligence of fellow-servants applies alike to each. They are considered by the State of Georgia as the same persons in every detail of their existence, in every requirement of duty and in every privilege granted and burden imposed.

This court has recognized the principle that in determining whether or not corporations belonged to the same class it is necessary to consider whether they are held by the taxing power as equally responsible and liable in other matters relating to their business.

Missouri Pacific Ry. Co. v. *Mackey*, 127 U. S. 205, 210.

Minneapolis & St. Louis Ry. v. *Beckwith*, 129 U. S. 26–29.

It is respectfully submitted that the ordinance involved in this case is void. While the taxing power has the right to classify they can not do so arbitrarily but must base their classification upon some reasonable ground. By the express terms of this ordinance the class established is defined. The tax is imposed on railroads for the privilege of using the street in doing business within the corporate limits. The fact that one is an electric road and the other a steam road is not such a reasonable difference as would authorize their separate classification and the truth of this has been recognized by the taxing power in dealing with these two persons in every other instance and respect. The fact that the local business of

one is transportation of freight and passengers and the local business of the other is the transportation of freight would not be such a difference in the business engaged in as would authorize placing them in separate classes, even if the taxing ordinance based the classification on a particular business engaged in rather than a privilege granted. We respectfully submit that this tax ordinance can not stand. The two persons, the plaintiff in error and the Central of Ga. R. R. Co. are both common carriers, are both subject to the same laws of our State with regard to the conduct of their general business, are both engaged in practically the same local business in the city of Savannah, and both enjoy the same privileges from the city of Savannah. A tax ordinance which requires the payment of $1,900 from one and nothing from the other is a mere arbitrary selection and can not be justified by calling it classification.

Second and Third Assignments of Error.

"The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it was void, because it impaired the obligation of the contract between the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, and the mayor and aldermen of the city of Savannah, made November 4th, 1897, and amended in April and July, 1898, set forth in the record."

"The court erred in refusing to hold and decide that the said tax ordinance of the mayor and aldermen of the city of Savannah was an authority exercised under the State of Georgia and was void upon the ground that it was repugnant to that clause of the Constitution of the United States which prohibits any State from impairing the obligation of a contract."

The contract of 1897 as amended is a contract on the part of the city of Savannah that they would grant the use of the streets named therein to the plaintiff in error. We

recognize that as to all of the streets named in that contract there was no express agreement to this effect, except the language used in the last amendment to that contract, to wit: "and the right to lay down, construct, maintain and operate said railway through said streets, as above stated, is granted" (Printed Record, p. 28, par. 1st). Nevertheless we earnestly contend that when the contract is construed as a whole and in view of the large consideration passing from the plaintiff in error, and in view of the circumstances surrounding the parties, and their evident intention as illustrated by the entire contract, that there is a clear and unquestionable implication that the contract bound the city to grant the use of the streets to the plaintiff in error free from any additional burdens.

The prohibition of the Constitution against the impairment of the obligations of contracts applies to implied as well as express contracts

Fisk v. *Jefferson Police Judge*, 116 U. S. 131.
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98, 112.

This court has frequently decided "that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intentions they have manifested in forming them."

O'Brien v. *Miller*, 168 U. S. 287, 297.
Goddard v. *Foster*, 17 Wallace, 123, 142–143.
Black v. *United States*, 91 U. S. 267, 269.

Where the court from all the circumstances surrounding the contract and the consideration and acts of the parties implies certain stipulations or terms it does not thereby vary the contract or introduce new terms into it, but declares that certain acts unexplained by the compact

impose certain duties and that the parties had stipulated for their performance. *Ogden* v. *Saunders*, 12 Wheaton, 341–342.

Besides the express language referred to above that the "right to lay down, construct, maintain and operate" its railway was "granted" to plaintiff in error, it appears that in land and money the plaintiff in error paid to the defendant in error over $10,000 (Printed Record, page 43). On the examination of the contract it will appear that not a single thing passed from the city to the plaintiff in error in the way of consideration for this amount of money paid the city, except the right to use the streets. The changes made by the plaintiff in error of its railway line as required by the contract were not made for its benefit, but as expressly stated by that contract for the benefit of the public (Printed Record, pages 21–22, par. 1 of contract; Printed Record, page 24, par. 3 of contract). The plaintiff in error was required at its expense to remove a large amount of trackage from certain streets in the city of Savannah (Printed Record, page 23, par. 2 of contract). The city desired to open Barnard Street and required the plaintiff in error to pay the city the amount necessary for this purpose (Printed Record, pages 24–5, par. V). The plaintiff in error was required to pay one-half of the sum necessary to open Tenth Street (Printed Record, page 25 b). They were required to convey free of cost the land necessary to open Barnard Street (Printed Record, page 25 c). They granted certain land in Bolton Street to enable the city of Savannah to open that street (Printed Record, page 25 d). The city of Savannah by the contract bound the plaintiff in error never to charge more than five cents a fare and to furnish proper transfers at all intersecting points (Printed Record, page 25 f). They granted certain land in Whitaker Street to the city of Savannah to enable the city to open

that street (Printed Record, pages 25–6 g). The city of Savannah required the plaintiff in error at its expense to remove a great number of switches and sidetracks and to pave the streets where such removals were made (Printed Record, page 27, par. first). In each and every one of the above matters the benefits accrued to the city of Savannah and the public and not to the plaintiff in error. What therefore was the consideration which moved the plaintiff in error to go to these large expenses, to grant their land to the city, to assist the city in opening its streets, and to arrange their system of railway to suit the city and the public? The conclusion is irresistible that in view of the express language of the contract as well as by necessary implication, the plaintiff in error was to use these streets free of any further charges for such privilege.

The city having accepted the benefits under the contract with the plaintiff in error,—this ordinance imposing a tax for the privilege of using those streets named in the contract,—impairs the obligations of the same.

Chicago v. *Sheldon*, 9 Wallace, 50.

City of St. Louis v. *Western Union Tel. Co.* 63 Fed. 68.

Iron Mountain R. Co. of Memphis v. *City of Memphis*, 96 Fed. 113.

Mercantile Trust and Deposit Co. v. *Collins Park & B. R. Co.* 101 Fed. 347.

In *Detroit* v. *Detroit Citizens' Street Railway Company* (184 U. S. 368) and in *Cleveland* v. *Cleveland City Railway Company* (194 U. S. 517) it was held that an ordinance of a city council providing for an extension of the tracks of a street railway and fixing the rate of fare constituted a contract and that that contract was impaired in violation of the Constitution of the United States by a subsequent ordinance which undertook to reduce the rate of fare.

These decisions have a direct application to the present case. The ordinances here relied upon constituting the contracts between the plaintiff in error and defendant in error and the subsequent ordinances purporting to be adopted under a continuing legislative authority in the mayor and aldermen of Savannah laying taxes not contemplated by the original ordinances, constitute a violation of the contract.

Fourth Assignment of Error.

"The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it included Whitaker and Bolton streets, the land for which had in part been conveyed to the mayor and aldermen by the railway for the purposes of streets, and at the same time the easement for railroad purposes over said land was expressly reserved to the railway, this being done by contract with the mayor and aldermen, the obligation of which contract the plaintiff contends the ordinance impairs."

We respectfully submit that with regard to the charge put upon the plaintiff in error by this tax for using Bolton and Whitaker streets there can be no question whatsoever as to this ordinance impairing the obligation of the city contained in the contract of 1897. It seems to us that neither authority nor argument is necessary to sustain this contention. The plaintiff in error conveyed to the city the land in portions of these two streets necessary to open these streets, for the benefit of the city and the public, and the contract expressly and specifically reserves to the plaintiff in error the easement of use in such portion for its railway purposes. The language of the contract as to Bolton Street is:

"The said railway company owning certain land in Bolton Street, is to convey to the mayor and aldermen of

the city of Savannah, so as to aid it in opening Bolton Street eastwardly of Savannah, Florida and Western Railway tracks, all of the right, title, interest, and estate of the said Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, in and to such lands in Bolton Street, preserving, of course, the easement of the said street railway company over said land for its railway purposes." (Printed Record, p. 25, par. *d*.)

The language as to Whitaker Street is:

"The said railway company is to procure from the City and Suburban Railway Company a conveyance to the mayor and aldermen of the city of Savannah, free of cost, of all the right, title, interest and estate of the said last named railway company in and to that portion of Whitaker Street which runs through the City and Suburban Railway stables property, lying between Second and Fourth Streets, preserving, of course, the easement of the said railway company over said land for its railway purposes." (Printed Record, pp. 25, 26, par. *g*.)

There can not be a stronger contract in favor of the plaintiff in error for the reason that the city was not only paid for the privilege granted the plaintiff in error to use these portions of Bolton and Whitaker streets, but the easement of use in such portion was expressly excepted from the grant by the railway.

The exception from the grant to the city of this land of the easement of use left such easement in the plaintiff in error as of his former right or title.

Ashcroft v. *Eastern R. R.* 126 Mass. 196, 198.

The only possible escape from the conclusion that this ordinance impairs the obligation of the contract between the city and the plaintiff in error, in so far as the portions of Bolton and Whitaker streets granted to the city are concerned, is the suggestion that the tax is not imposed for the use of the streets. Our reply to this is that the

language of the ordinance expressly states that the tax is imposed "for the use of the streets," and furthermore, that under its terms the plaintiff in error is not required to pay except for tract "used." It follows that if the plaintiff in error uses a mile of track over the portion of Bolton Street granted to the city, it must pay $100. If they do not use such mile of track, they would pay nothing. No clearer and more certain test than this can be imposed to determine the question as to whether, or not, the tax is imposed for the use of the streets.

This ordinance being void on this ground in so far as it relates to Bolton and Whitaker streets, the entire ordinance is void as it is impossible to separate the illegal portion of the tax from the legal portion—admitting for the sake of argument that it is otherwise legal.

Where a tax assessment includes property not legally assessible and the part of the tax assessed upon the latter property can not be separated from the other part, the entire tax assessment is invalid.

Santa Clara County v. *Southern Pacific R. R.* 118 U. S. 394–415.

California v. *Pacific R. R. Co.* 127 U. S. 1, 29, 45.

Dissenting opinion in *Central Pacific R. R.* v. *California*, 162 U. S. 168 (bottom of page).

Although in these cases the tax involved was a property tax, we respectfully submit that the principle is equally applicable to the tax involved in the case at bar.

No evidence was introduced to show how many miles of Bolton and Whitaker streets were granted to the city, and therefore the record does not disclose how much this tax of $1,000 should be reduced for such portions of Bolton and Whitaker streets used by the plaintiff in error.

The burden is on the taxing power to show that the

illegal portion of the tax can be separated from the legal. This principle is clearly stated by the court in the case, cited above, of *Santa Clara County* v. *Southern Pacific R. R.* on page 415 as follows:

"It was then incumbent upon the plaintiff (the taxing power in that case) by satisfactory evidence to separate that which was illegal from that which was legal—assuming for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for such amount, if any, as was justly due."

We respectfully submit in view of these authorities that this ordinance is void under this assignment of error.

DAVID C. BARROW,
GEORGE A. KING,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1904.

No. 288.

THE SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY, OF SAVANNAH, GA.,
Plaintiff in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH.

In Error to the Supreme Court of Georgia.

Brief of William Garrard, for Defendant in Error.

PRESSES BRAID & HUTTON, SAVANNAH, GA.

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Supreme Court of the United States.

OCTOBER TERM—1904.

No. 238.

THE SAVANNAH, THUNDERBOLT & ISLE OF HOPE RAILWAY, OF SAVANNAH, GEORGIA,
Plaintiff in Error,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
Defendant in Error.

In Error to the Supreme Court of Georgia.

BRIEF OF WILLIAM GARRARD, FOR THE DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, and other street railroad companies had been paying to the defendant in error, for several years prior to 1899, a specific or business tax of four hundred (400) dollars, as well as a specific tax

of twenty-five (25) dollars for each and every car used in the City of Savannah, per annum (Record 14).

In the Tax Ordinance of Savannah, adopted for the year 1899, and amended March 22, 1899, this was changed, and the business tax was graded, so that street railroad companies had to pay "for the privilege of doing business in the city, and for the use of the streets of the city," at the rate of $100 per mile or fraction of a mile of track used in said city, and, in addition, $25 for each car used in the city, (pp. 13 and 14).

This street railroad company controlled another similar company, and the joint mileage in use in the City was: nineteen (19) miles, (p. 47).

Plaintiff in error paid $25 for each car, for year 1899, voluntarily, and took out a badge for each car, (p. 14).

The business tax of $1,900 for 1899, plaintiff in error refused to pay. Accordingly, execution issued for the same on 22nd of July, 1899, as required by the Tax Ordinance, (p. 14), whereupon, an equitable petition was filed by this street railroad company, in the Superior Court of Chatham County, Georgia, seeking injunction against levy and sale under said execution, and a temporary restraining order was granted, August 19, 1899 (p. 11).

To this, the City filed its answers (pp. 12, 13, 14 and 15). Plaintiff filed two amendments (pp. 16 to 29). On hearing had, February 19, 1900, the trial judge held the tax a lawful one, and dissolving the restraining order, refused the injunction sought (p. 29).

Thereupon, the plaintiff in error carried the case by "swift writ of error" to the Supreme Court of Georgia, where it was argued March 21, 1900, and then, on motion of plaintiff in error, re-argued July 17, 1900, and decided November 26, 1900; the Supreme Court sustaining the Court below, as will be seen, by reference to the decision in 112th Ga., p. 164, wherein the opinion is delivered by the Chief Justice.

Thereupon, in regular course, the case came on for trial, and the court directed a verdict for the defendant, and judgment was entered accordingly, (p. 30).

Motion for new trial was made by plaintiff (p. 31), brief of evidence filed (pp. 32 to 48), and on August 10, 1901, new trial was refused (p. 48); bill of exceptions was filed (pp. 6, 7 and 8), and on April 2, 1902, the Supreme Court of Georgia rendered its decision, sustaining the Court below in refusing a new trial (pp. 49, 50 and 51), which case is reported in full, in 115th Ga., p. 137, and this decision of the Supreme Court of Georgia is alleged by plaintiff in error to be erroneous, on the grounds stated in the Assignment of Error (p. 5).

Counsel for defendant in error is indebted to his able predecessor in office, Hon. Samuel B. Adams, for copies of his briefs used in the several hearings, and this brief is largely compiled from them.

IT IS TO BE NOTED,

(a) No point is made as to the justice or amount of the tax complained of; objection being based entirely upon the proposition, that there is an absence of power in the defendant in error to lay any assessment or tax on a street railroad company, in the nature of a busine s or specific tax.

(b) The statement in defendant's verified answer, that "plaintiff is commonly known as a Street Railroad Company, and the bulk of its business and revenue is due to the use of the streets of the City of Savannah by its electric passenger cars," is nowhere controverted or denied, but, is admitted by plaintiff's president (p. 45).

(c) It is nowhere controverted or denied, that the statements in the second paragraph of the answer, are true, to the effect: that, prior to the adoption of this Tax Ordinance, plaintiff and other street railroad companies had been required to pay, and had paid, to the City a specific tax of four hundred (400) dollars per annum, and besides, a specific tax of $25 for each car used. [illegible]e present tax was graded, so it might not work [illegible]ti[illegible]e to a small company using but a

small part of the public streets, that on January 31, 1899, this plaintiff paid the car tax for 1899, voluntarily, and had of its own accord paid same for a number of years (p. 14).

If plaintiff's contention is sound, it has never been liable for the portion of the specific tax based on the number of cars used, nor for any tax at all to the City of Savannah, except property tax paid through the Comptroller General's office, and the proper pro rata assigned to the City.

(d) *It is admitted by plaintiff, that: "the execution issued for a specific tax, and this tax was among the specific taxes mentioned in the Tax Ordinance, referred to in the pleadings," (p. 47).*

(e) An exact copy of the original Tax Ordinance of December 28, 1898, and of the amendment of March 22, 1899, is set out in the second paragraph of the answer (p. 14), and in plaintiff's amendment (pp. 16, 17). The amendment of the Tax Ordinance makes more clear the intent of City Council, as to the original Ordinance, touching that part of the specific tax based on mileage, and is careful to preserve the other part, based on the number of cars.

This is important, to show that City Council retained the right to impose the car tax, which had been previously paid.

So, that the only change in the character of this legislation was, the substitution for a lump sum, which had been paid for years, of an assessment based upon mileage within the City limits.

(*f*) It is contended, by plaintiff in error, that the Central of Georgia Railway Company, a great commercial railroad, has a track on River and other streets, so as to deliver freight cars from a distance, to the wharves and other points (p. 43), and that plaintiff ought not to pay a business tax on its City mileage, because, as a witness "is informed and believes" (p. 33), no attempt was made to impose tax on such railway company for the privilege of using streets.

If this statement on information was any evidence of the fact, it was not material.

The Ordinance applies to *all* street railroads. If the City failed to collect such a tax from another street railroad (which is not claimed), this would not be excuse for plaintiff not paying; the remedy would be by mandamus. (86 Ga., p. 307). The Central of Georgia Railway Company, of course, does not come within the Ordinance, either in terms or spirit.

LAW POINTS.

I.

AS TO THE FIRST ASSIGNMENT OF ERROR (pp. 5, 6), WE SUBMIT, THAT IT IS UTTERLY UNTENABLE, UNDER THE LAW AND THE FACTS.

The allegation is, that the Tax Ordinance denies to plaintiff in error "the equal protection of the laws," in that:

(1) It is "an arbitrary classification by the taxing power"; and,

(2) It is "a discrimination against the said plaintiff, in that, it did not apply to other persons similarly situated, and using the streets under like condition."

WE REPLY:

(a) Under the local law, this Ordinance is valid and legal.

The legislative or municipal authorities may classify all subjects of taxation, exclusive of property, and may tax or exempt any or all such classes, with a uniform rate upon the whole of each class taxed.

Savannah vs. Weed, 84th Ga., 683.

The only requirement as to business taxes in the Georgia Constitution, is: *"All taxation shall be uniform upon the same class of subjects."*

Ibid, pp. 685, 686.

This is the law, generally.

Cooley on Taxation, 3rd Ed., Vol. 2d, p. 1100.

In Atlanta, by Charter, a person who pays an *ad valorem* tax on merchandise, cannot be required to pay more than $25 specific business tax, but City Council has right to classify.

In Keely vs. Atlanta, 69th Ga., 583, it was held, that under this charter, the City Council could classify a department store into several departments, and tax each as a separate business, and, further, that, the *"policy of the Ordinance"* is not for Courts to decide.

In Savannah vs. Crawford & Lovell, 75th Ga., 35, the Court notices the extremely full charter powers of Savannah, touching this class of taxation, sustains the right to increase a specific tax on a merchant who had already paid the same, and who claimed that his right to do business for the amount paid had become vested, and the Court used this language, p. 40: *"The claim is more strictly to an immunity or exemption from an equal and common burthen imposed upon other citizens, than to a vested right, and in such case,*

the party claiming the exemption, must produce the law exonerating him." (Italics ours).

In Goodwin vs. Savannah, 53rd Ga., 410, it was held, that "a tax levied by the Mayor and Council of Savannah on the business of a common carrier within the City, is not illegal or unconstitutional, because the tax is graduated according to the number of drays, carriages, wagons, etc., used in such business."

See, also, Home Insurance Co. vs. Augusta, 50th Ga., 530 (2); Southern Home Building & Loan Association vs. Stewart, Tax Collector, 109 Ga., p. 80, wherein, a tax of one dollar for each telephone station or box imposed by the General Tax Act of Georgia, is held to be an occupation or business tax, and not a tax on property, and so a tax of 2½ per cent. on gross receipts of express companies, and the Court holds further (5th head-note) *"Whether occupations shall be taxed, and if taxed, how they shall be classified, are questions referred by the Constitution to the General Assembly, but all such taxes, when levied, shall be uniform upon the same class of subjects";* (Italics ours); Weaver vs. The State, 89 Ga., 642, as to a tax on business of selling sewing machines, tax held not to discriminate, and to be legal and Constitutional; Davis vs. Macon, 64th Ga., 128.

IN SAVANNAH, THUNDERBOLT & ISLE OF HOPE RY. CO. VS. SAVANNAH, 112TH GA., 166 AND 168, THIS VERY TAX IS

HELD TO BE A PROPER BUSINESS TAX, AND LEGAL IN ALL RESPECTS.

(*b*) On the merits of the case, there was no error in the decision rendered by the Supreme Court of Georgia in this case in 112th Ga., p. 164, and 115th Ga., p. 137.

All persons, generally, natural and artificial, who live in Savannah, or do business therein, are subject to specific or business tax, under the broad powers of the City, to be found in Section 4847 of the Code of Georgia, for 1882. This section of said Code, referring to the powers of the Mayor and Aldermen of said City, is, as follows:

"Sec. 4847. TAXATION. They are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said city, and those who hold taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said city, and may enforce the payment of such assessments and taxes, in such manner as said mayor and aldermen may prescribe. Besides real and personal property, the said mayor and aldermen may tax capital invested in said city, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession,

faculty, trade or calling, dividends, bank, insurance, express and other agencies, and all other property or sources of profit not expressly prohibited or exempt by State law or competent authority of the United States."

The Supreme Court of Georgia in a number of decisions where this clause of the charter of Savannah has been before it, has upheld it, as being as broad as possible to cover every kind of taxation. It was held by said Court, regarding this clause, in 112th Ga., p. 164: "This is about as broad a power, as the English language can express, to tax businesses and occupations."

In Charlton vs. Savannah, 36th Ga., 460, the Court held, that Dr. Charlton, as he had been licensed by the authority of the State to practice his profession in Savannah, could not be required by the city authorities, to take out a license as a condition precedent to his following his profession in the city, but, that the city could lawfully lay a business tax on his profession. See page 482.

In Burch vs. Savannah, 42nd Ga., 596, it was held, that a party who had paid the charges required of retail liquor dealers, and the per cent. on his gross sales, could also be required to pay the business tax, assessed against retail dealers generally.

In the case of Home Insurance Co. vs. Augusta, 50 Ga., 530, although the tax was called a "license tax," it was held notwithstanding to be a "business tax," and not a license, and the Court holds, that Augusta had a right to put this tax on the insurance company under the power in the charter to "make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same, as may seem expedient, &c."

In Wright & Hill vs. Atlanta, 54th Ga., 645, it was held, that a business tax could be required of parties who had obtained license from the State to prosecute their respective callings. This was a tax upon the business of lawyers.

In Savannah vs. Hines, et al., 53rd Ga., 616, the imposition of a business tax on lawyers, by the City of Savannah was upheld, notwithstanding the fact, that they had license to practice law in Savannah from the State.

OUR CONTENTION IS, THAT THE POWER TO LAY THIS BUSINESS TAX IS COVERED BY THE CHARTER OF THE CITY, WHICH IS VERY BROAD AND COMPREHENSIVE, AS TO THE TAXING POWERS OF THE CITY OF SAVANNAH, AND, BEYOND ALL, THIS FULL POWER IS GRANTED BY THE ACT OF DECEM-

BER 18, 1894, AMENDING THE GENERAL RAILROAD LAW OF DECEMBER 17, 1892. SEE ACTS OF 1894, P. 69. THIS ACT HAS BEEN CODIFIED IN THE CODE OF GEORGIA, OF 1895, AND NOW APPEARS, AS SECTION 2180 OF SAID CODE, WHICH IS AS FOLLOWS:

"Sec. 2180. STREET-RAILROADS, HOW INCORPORATED. All the provisions of the preceding Divisions shall govern in the incorporation, control and management of suburban and street railroad companies, in so far, as the same are applicable and appropriate thereto. Any number of persons not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding Division, with this additional requirement, that they must in their petition specify what city, town or village, and in what streets thereof, they propose to construct and build said railroad: PROVIDED, that no street railroad incorporated under this Division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: AND PROVIDED FURTHER, that all such street railroad companies incorporated under this Division, shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: AND PROVIDED FURTHER,

only such of the powers and franchises that are conferred by said Division shall belong to said street railroad companies, as shall be necessary and appropriate thereof; and, in case any street railroad incorporated under this Division shall be partly located in an incorporated town or city, and partly located in the country, then the provisions of the preceding Division which apply to other railroads located in the country, shall apply to it, so far as that portion of its road is concerned."

It is admitted, that plaintiff in error was incorporated under said Act. (See Record, pp. 46 and 47).

The second "proviso" is broad and sweeping: "ALL SUCH STREET RAILROAD COMPANIES INCORPORATED UNDER THIS DIVISION SHALL BE SUBJECT TO ALL JUST AND REASONABLE RULES AND REGULATIONS BY THE CORPORATE AUTHORITIES, AND LIABLE FOR ALL ASSESSMENTS, AND OTHER LAWFUL BURDENS, THAT MAY BE IMPOSED UPON THEM FROM TIME TO TIME."

The words "assessments and burdens" were before this Court in Wells vs. Savannah, 181 U. S., pp. 540-1-2-3, and it was there held, that "assessments" and "taxes" were interchangeable terms.

In the Augusta case, in the Georgia Supreme Court, heretofore cited, on pages 539 and 540 of 50th Ga., the court answering the question, What is the meaning of the words "assessments on the inhabitants"? holds, that it includes a business tax on the corporation before that court, and, that a business tax could no more be excluded from the words used, than a property tax.

The first "proviso" in said Code, Sec. 2180, reads:

"PROVIDED, THAT NO STREET RAILROAD, INCORPORATED UNDER THIS DIVISION, SHALL BE CONSTRUCTED WITHIN THE LIMITS OF ANY INCORPORATED TOWN OR CITY, WITHOUT THE CONSENT OF THE CORPORATE AUTHORITIES."

The case stands, as if the plaintiff in error had specifically agreed, in consideration of the charter rights obtained by it under this Act of 1894, and under the consent given by the municipal authorities, that the road should be constructed within the limits of Savannah, that the municipal authorities of said City might govern and control it by *"just and reasonable rules and regulations,"* and, also, might lay upon it from time to time all taxes, property and specific, which these authorities might see fit to lay, as well as "other lawful burdens."

The plaintiff in error can take no comfort from the words "and other lawful burdens." They were not intended to restrict the broad scope of the previous words or subtract anything therefrom. By the use of these words, the Legislature meant to recognize that specific taxes and other taxes were authorized and made lawful, but, that there might be other lawful burdens, such as street improvements, paving assessments and the like.

In the case of Frankford & Philadelphia Passenger R. R. vs. Philadelphia, 58th Penna. St., 119, fifty dollars were charged and sustained for each car, under the law which authorized the city to provide the "proper regulation of omnibuses or vehicles in the nature thereof."

And see Ry. Co. vs. Philadelphia, 101st U. S., pp. 534 and 535, wherein this Court, substantially, holds, that the grant to a corporation to carry passengers in cars over the streets of a city does not involve exemption from liability to municipal regulations, no more than in the case of a natural person; that, when a corporation is authorized to conduct a specified business within a municipality, it is intended, that the business shall be conducted under the rules, restrictions and regulations, which govern others transacting the same business.

If the stockholders of the plaintiff were conducting a street railway business without a charter, they would

certainly not be exempt from a business tax, no more than the owners of omnibuses, drays and other vehicles; certainly, the mere fact of incorporation under such an act as that of 1894, subjecting them to the rules, regulations, assessments, burdens and taxes imposed by the city, cannot exempt them.

(c) The plaintiff admits this to be a specific tax, just as the other specific or business taxes set out in Tax Ordinance, (Record, p. 47).

Courts take judicial cognizance of the Ordinances of Savannah, just as they do of the laws of the State, and these Ordinances published by authority rank as evidence, just as the laws of the State similarly published.

Code of 1882, Sec. 4872, which section is as follows:

"Sec. 4872. ORDINANCES OF THE CITY, HOW EVIDENCED. All Ordinances, by-laws, rules and regulations of said city, published by authority of said mayor and aldermen, and promulgated as such by said authority, shall be evidence in all the Courts of this State to the same extent that laws of the State, as published by authority, shall be evidence of such laws; and when, in any case, an exemplification of any such Ordinance, by-law, rule or regulation, minute of council, or any paper of file in any of the departments of the government of said city may

be required, the same may be authenticated under the official signature of the mayor, or acting mayor, and the seal of said city."

In 107th Georgia, p. 432, the Surpreme Court of Georgia, referring to the Ordinances of Savannah, holds: "Of these Ordinances, this Court will take cognizance, equally with the acts of the Legislature."

The Tax Ordinance of 1899 is devoted, in large part, to the exaction of specific or business taxes.

See pamphlet Tax Ordinance 1899, pp. 6, *et seq.*

(d) THE PLAINTIFF IN ERROR, NOWHERE IN ITS PLEADINGS OR EVIDENCE, CHALLENGES THE AMOUNT OF JUSTICE OF THE TAX OR ITS MODE OF APPORTIONMENT.

(e) IT IS NOT DENIED OR CONTROVERTED, BY PLAINTIFF IN ERROR, THAT, FOR SEVERAL YEARS BEFORE 1899, IT HAD BEEN REQUIRED TO PAY AND HAD PAID, UNDER THE TAX ORDINANCES OF THE RESPECTIVE YEARS, A SPECIFIC OR BUSINESS TAX OF $400, AND HAD ALSO PAID $25 FOR EACH CAR USED, NOR DOES IT DENY, THAT FOR

THE YEAR 1899, IT VOLUNTARILY, ON JANUARY 31, 1899, PAID THE PORTION OF THIS BUSINESS TAX INCLUDED IN THE CHARGE PER CAR ($25).

(f) The classification in the Ordinance, including the Amendment, meets the requirements of the State law; it covers *all* street railroad companies, and exempts none of this class.

The classification is not *"arbitrary,"* unless it be in the sense that all designations and selections of classes to pay business taxes may be termed *"arbitrary."* Certainly, Savannah can force some classes to pay business or specific taxes, and exempt other classes, under the Georgia Constitution.

(g) The Ordinance, in laying this tax, in no wise "discriminates" against plaintiff in error; *all street railroad companies "similarly situated, and using the streets under like conditions,"* being required to pay according to mileage within the City, and according to number of cars used in the City.

"An occupation tax may be levied on a street railroad, for its use of the streets by tracks and cars."

Cooley on Taxation, 3rd Ed., Vol. 2nd, p. 1121.

(h) We submit, that this First Assignment of Error is unsupported by proofs or law.

The Ordinance clearly involves no *"arbitrary classification,"* nor does it *"discriminate,"* against plaintiff in error.

II.

THE SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR (P. 6) CAN BE CONSIDERED TOGETHER, AS THEY ALL RELATE TO THE ALLEGATION IN PLEADINGS OF PLAINTIFF IN ERROR, (2ND AMENDMENT, PP. 20 AND 21) TO THE EFFECT, THAT THE ORDINANCE AS AMENDED, IS UNCONSTITUTIONAL, NULL AND VOID, AS IMPAIRING THE OBLIGATION OF A CONTRACT.

(*a*) It seems, that this street railroad company petitioned the City Council of Savannah (Record, p. 42), showing, that, in addition to its own original lines, (including those of the City & Suburban Railway Company), (p. 47), it had acquired the lines of the Electric Railway Company of Savannah, and, that, for the purpose of operating its railway *"more economically and to better advantage,"* as well as to give

the public better service, it desired *"to readjust its several lines, etc.,"* and desired to be heard, so that a satisfactory arrangement could be arrived at.

This resulted in a report of a Committee, adopted by Council, specifying in detail, the lines so to be readjusted (pp. 35 to 42).

A careful reading of the agreement reached between the City Council of Savannah and the plaintiff in error, touching the readjustment of its lines, in connection with the said petition to the City Council, the basis of said agreement, *clearly shows, that this arrangement was made at the instance of the plaintiff in error, and for his own benefit.*

The plaintiff in error had its own lines, as well as those of the City & Suburban Railway Company and the lines of the Electric Railway Company of Savannah, and it desired to harmonize them, and blend them into one system, to do which, required the taking up of tracks in one place, the laying them down in another, the formation of different belts, involving the opening of certain streets so as to perfect said belts, and the City having the right of condemnation, it was provided in the agreement, that the City should condemn or acquire land for those streets, the street railroad company to pay for the same, in some instances wholly, in others, only in part. Not a dollar was paid to the City for the privilege of using a street already acquired. There is no expression in any part of the

contract, which suggests, that the municipal authorities ever contemplated the surrender of the right to tax, as now claimed.

The testimony of James H. Johnston, President of the Street Railroad Company, (pp. 43 and 44), shows, that whatever money was paid by the street railroad company for the acquirement of streets was done through the medium of the City, the City purchasing (with its power of condemnation back of it), and the street railroad company paying certain sums, so as to get its tracks through certain streets.

(b) The City of Savannah has never entered into any agreement with the plaintiff in error, which will be violated in terms or in spirit, by the imposition of this business tax.

The Mayor and Aldermen of the City of Savannah would have no right, in law, to make such a contract. The agreement seems to have been made in the year 1897, with two slight amendments in the summer of 1898, and there is certainly nothing therein, to prevent the City Council of Savannah in 1899, from laying this business tax upon street railroad companies.

No act of the Legislature of Georgia has been cited, which shows or even suggests, a purpose to confer such a power upon the City. The Constitution of 1877 prohibits any exemptions from taxation as to *"ad valorem"* taxes, except such as are designated in the

Constitution, and as to business tax, prevents any exemptions in any class which may be taxed.

(c) It was held by the Supreme Court of Georgia in 1899, that: "WHILST FORMERLY, THE STATE COULD, BY CONTRACT, RESTRICT ITSELF IN THE EXERCISE OF THE TAXING POWER, A MUNICIPAL CORPORATION HAD NO SUCH CAPACITY, IN RESPECT TO THE TAXING POWER COMMITTED TO IT."

> Augusta Factory vs. Augusta, 83rd Ga., 734, and the cases cited therein with approval (page 743).

The case of Mack vs. Jones, 21 N. H., 393, cited as aforesaid, is one where the property was conveyed by the City, and the City's deed contained an assurance of exemption from municipal taxation, and yet this contract was held to be void.

> See, also, Savannah vs. Crawford & Lovell, 75 Ga., pp. 35, 38, 39 and 40.
>
> Wells vs. Savannah, 107th Ga., pp. 2, 3 and 4.

In Wells vs. Savannah, 181 U. S., 539, 540, this Court holds, that the facts proven must show a contract of exemption expressed in terms, or else it must

be implied beyond all doubt; if any doubt, exemption does not exist.

In New Orleans City & Lake R. R. Co. vs. New Orleans, 143 U. S., 192, it was held, that an Ordinance of the City of New Orleans, imposing a license tax for the business of running horse or steam railroad for transportation of passengers, (the tax being twenty-five hundred dollars for the year 1887), does not impair the obligation of a contract made before the passage of the statute, by which the City sold to the railroad company for a large price ($630,000) the right-of-way and franchise, for twenty-five years, to run a railroad over certain streets and according to certain regulations, and the company agreed to pay the City, annually, a real estate tax, and the City bound itself not to grant during the same period a right-of-way to any other railroad company, over the same streets.

This Court held, on page 195, that, assuming, without deciding it, that the city of New Orleans was authorized to exempt this New Orleans Street railroad company from taxation, the contract between them affords no evidence of the intention to do so, and, on page 196, the Court states, that if this railroad company had desired or intended to have an exemption of any kind from taxation, it should have required such a provision to have been inserted in its charter. "THE CONSTITUTION OF THE UNITED

STATES DOES NOT PROFESS, IN ALL CASES, TO PROTECT PROPERTY FROM UNJUST AND OPPRESSIVE TAXATION BY THE STATES. THAT IS LEFT TO THE STATE CONSTITUTIONS AND STATE LAWS."

In City of Los Angeles vs. Southern Pacific Railroad Co., 64th Cal., 438, it is decided: "The grant by the City of Los Angeles to the defendant of the right to maintain and operate its road within the city limits, held, not to exempt it from the payment of the license tax (in this case $1,220) imposed upon steam railroads carrying on their business within the City." In the case between the same parties in 61 Cal., 59, the right to charge a license tax was sustained, under the general power which did not mention a railroad, particularly a commercial railroad, and the point was made by the attorney for the railroad company, that, the defendant was a corporation operating a public franchise, and having an express license to do what the license charged covered.

See, also, City of Wyandotte vs. Corrigan, 10th Pac. Reporter, 99, and F. C. & P. R. R. vs. the City of Columbia, 32nd S. E. Reporter, 408.

2. Dillon on Municipal corporations, 4th Ed., Sec. 789; Denver vs. Street R. R., 29th L. R. A., 610.

III.

THE FIFTH ASSIGNMENT OF ERROR (P. 6) IS TO THE EFFECT, THAT THE COURT ERRED IN REFUSING TO ENJOIN THE ENFORCEMENT OF SAID TAX ORDINANCE "NOTWITHSTANDING THE "OBJECTION, THAT THERE WAS NO "LAW IN THE STATE OF GEORGIA, "WHICH AUTHORIZED THE MUNICIPAL "GOVERNMENT OF A CITY TO LEVY "ANY LICENSE TAX, OR BUSINESS TAX "UPON A RAILROAD COMPANY, NOR, TO "COMPEL A RAILROAD COMPANY TO "PAY FOR THE PRIVILEGE OF DOING "BUSINESS, SAID ORDINANCE FOR THIS "REASON BEING AN ATTEMPT TO TAKE "THE PLAINTIFF'S PROPERTY, WITH-"OUT DUE PROCESS OF LAW, AND, "THEREBY, IN VIOLATION OF THE CON-"STITUTION OF THE UNITED STATES."

(*a*) This assignment of error is, manifestly, abortive, and, absolutely without legal virility.

By reference to the original petition of plaintiff in error in the trial court (Record, p. 10), it will be observed, in the fourth paragraph, that it is alleged:

"The said tax of nineteen hundred dollars upon petitioner's real estate is illegal, and contrary to law. It is assessed without authority of law. It is not assessed and levied according to law providing for the taxation of railroads by municipal authorities." And, again, in paragraph five, it is alleged: *"Notwithstanding the fact, that this exaction of nineteen hundred dollars is illegal, and without authority of law," etc.* (Italics ours).

By reference to the first amendment filed to the petition (p. 17), it will be observed, that petitioner alleges as follows: *"Your petitioner avers, that the Mayor and Aldermen of the City of Savannah on March 22, 1899, were without the power to pass the said amendment, by which, they undertook to transform specific property tax into a so-called license tax."* (Italics ours). And again, "THERE IS NO PROVISION OF LAW IN GEORGIA, WHATSOEVER, AUTHORIZING THE MUNICIPAL AUTHORITIES OF THIS STATE, TO COMPEL RAILROAD COMPANIES, OF ANY KIND, TO PAY FOR THE PRIVILEGE OF DOING BUSINESS IN THE CITY, OR FOR THE USE OF THE STREETS OF THE CITY," etc. (Italics ours).

By reference to the second amendment to the petition (p. 20), it will be seen, that, while the petitioner

alleges in the first paragraph, that this Ordinance as amended "is an authority exercised under the State of Georgia, and is repugnant to the Constitution of the United States, in that it impairs the obligation of the contract entered into between the said Mayor and Aldermen of the City of Savannah and your petitioner on November 4, 1897," etc., yet, in the second paragraph, of the same amendment, the petitioner alleges as follows:

"THIS ORDINANCE IS AN AUTHORITY EXERCISED UNDER THE STATE OF GEORGIA, AND THERE IS NO LAW IN THAT STATE, WHICH AUTHORIZES THE MUNICIPAL GOVERNMENT OF A CITY TO LEVY ANY LICENSE TAX OR BUSINESS TAX UPON A RAILROAD OF ANY KIND, NOR TO COMPEL A RAILROAD COMPANY OF ANY KIND TO PAY FOR THE PRIVILEGE OF DOING BUSINESS"; and, petitioner sets up in this second paragraph, allegations that this Ordinance is in the teeth of the Fourteenth amendment, being an attempt to deprive petitioner of its property "without due process of law."

(b) THE PREMISES CONSIDERED, THE LOGICAL CONCLUSION IS IRRESISTIBLE. THAT IS TO SAY, THE PETI-

TIONER HAS ALLEGED ITSELF OUT OF COURT, IN THAT, IT RAISES NO FEDERAL QUESTION, AND COMPLAINS OF NO REAL VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, EITHER AS TO IMPAIRING THE OBLIGATION OF A CONTRACT, OR AS TO ANY INFRACTION OF THE FOURTEENTH AMENDMENT.

"The Mayor and Aldermen of the City of Savannah," is a municipal corporation, the creature of the State law. It gets its powers from the State law.

IF, AS ALLEGED BY PETITIONER, THERE IS NO STATE LAW IN GEORGIA, AUTHORIZING THE ADOPTION OF THE ORDINANCE IN QUESTION, BY THE MUNICIPALITY OF SAVANNAH, THEN, THERE IS IN THIS CASE NO FEDERAL QUESTION AT ALL, AND THIS COURT IS WITHOUT JURISDICTION.

A municipal ordinance passed *ultra vires* is not a law of the State, and an act performed thereunder is not an act of the State.

Hamilton vs. Hamilton, 146 U. S., 258-266.

An ordinance, adopted contrary to the law of the State (as here alleged) is not an act of the State.

Barney vs. City of New York, 193 U. S., 430.

"It must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does, really and substantially, involve a dispute or controversy as to a right, which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

W. U. Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., p. 239.

It is true, that there are allegations scattered through the petition and the amendments, that this ordinance as amended violates "the obligation of a contract," and that it seeks to deprive petitioner or property "without due process of law," but, these are mere conclusions of the pleader, and are not controlling.

They must be taken along with the express allegations in the petition and amendments, *that no law of the State of Georgia exists, which authorizes the adoption of such an ordinance,* and that, therefore, the authority of the Mayor and Aldermen of the City of Savannah was a pretended and void authority under the Georgia law, and by the latter allegations the petitioner kills its own case, so far as its right is con-

cerned, to have the judgment of the Supreme Court of Georgia reviewed and passed upon by this court.

This case is very similar, in this regard, to one tried in the Circuit Court of Appeals for the Fifth Circuit, being an appeal by the Mayor and Aldermen of the City of Savannah, et al., against Holst, et al., decided on October 10, 1904, where the Court of Appeals held, upon the decisions of the Supreme Court of the United States cited above, that there was no Federal question in the case, and therefore the Court took jurisdiction, and reversed the decision of the Circuit Court.

132nd Fed. Reporter, 901.

The plaintiff in error may claim that this Ordinance was unauthorized by law, but, its remedy was in the State Courts, not here.

In Walston vs. Nevin, 128th U. S., 582, this Court holds: "The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field, in Mobile vs. Kimball, (102 U. S., 691), 'This Court is not the harbor, in which the people of a State or County can find a refuge from ill-advised, unequal and oppressive State legislation.' "

IV.

IT IS RESPECTFULLY SUBMITTED, THAT NO FEDERAL QUESTION IS HEREIN INVOLVED, AND THAT THE JUDGMENT OF THE SUPREME COURT OF GEORGIA SHOULD BE AFFIRMED.

WILLIAM GARRARD,
For the Defendant in Error.

Supreme Court of the United States.

No. 238.—October Term, 1904.

The Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, Plaintiff in Error, vs. The Mayor and Aldermen of the City of Savannah.	In Error to the Supreme Court of the State of Georgia.

[May 15, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by the plaintiff in error to restrain the collection of a municipal tax by the defendants. The bill sets forth, among other grounds, that the tax impairs the obligation of a contract, and also is an attempt to take the plaintiff's property without due process of law, contrary to the Constitution of the United States. According to the bill and the fifth assignment of error there is no law of the State of Georgia which authorizes the imposition of the tax. Were this true the foundation of our jurisdiction would be gone and this writ of error should be dismissed. See *Barney* v. *City of New York*, 193 U. S. 430. But although the plaintiff has taken inconsistent positions and has confused questions for the State Court alone with those which may be brought here, still, since it has shown a clear intent to raise the Federal question from the beginning, since the bill in another place alleges that the tax is an authority exercised under the State of Georgia and other assignments of error present the points, and since the State Court has decided that the tax was authorized, we shall not stop the case at the outset. See *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258.

The tax is imposed under an ordinance of March 22, 1899, providing by way of amendment to one of the year before, that "street railway companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city and for the use of the streets of the city, at the rate of $100 per mile or fraction of a mile of track used in the city of Savannah by said railroad company." The plaintiff is a street railroad company, commonly known as such, and the great part of its business and revenue is due to the use of the streets of Savannah by its electric passenger street cars. One of its grounds of attack is that the Central of Georgia Railway Company, a steam railway, is not subjected to the tax, and yet that it also does business in the streets of the city by

transporting freights from its regular station to various side tracks, and charges an additional or local price. The plaintiff contends that a classification which distinguishes between an ordinary street railway and a steam railroad making an extra charge for local deliveries of freight brought over its road from outside the city, is contrary to the Fourteenth Amendment and void.

The other ground on which the validity of the tax is denied is a contract made between the plaintiff and respondent on November 4, 1897, amended in April, 1898, and on July 27, 1898. It is contended that this contract implies that the plaintiff is to have the use of the streets without further charges than those which it imposes.

The trial Court refused a preliminary injunction, and its decree was affirmed by the Supreme Court, 112 Ga. 164, which decided that this was a business tax, lawfully imposed, and that the plaintiff did not stand like the Central of Georgia Railway, which, as was held in *City Council of Augusta* v. *Central Railroad*, 78 Ga. 119, is subject to taxation by the State alone. On final hearing a verdict was directed for the defendant, and a decree was entered making the same the decree of the Court. This also was affirmed by the Supreme Court. 115 Ga. 137. The case then was brought here.

The merits of the case are pretty nearly disposed of by the statement. The argument on the first point is really a somewhat disguised attempt to go behind the decision of the State Court that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticise or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation it does so only because its main business is not in the city and the State reserves it for itself.

As to the contract, if the city had attempted to bargain away its right to tax, probably it would have been acting beyond its power. *Augusta Factory* v. *City Council of Augusta*, 83 Ga. 734, 743. However, it made no such attempt. It is enough to say that it uses no language to that effect, or words which even indirectly imply that exemption for the future was contemplated. *Wells* v. *Savannah*, 181 U. S. 531, 539, 540. *S. C.*, 107 Ga. 1. *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192. But we will go a little more into detail.

The contract was made on a petition of the plaintiff stating its desire to make changes in its lines of track "for the purpose of operating its railroad more economically and to better advantage and at the same time affording more adequate facilities to the public." Various changes were agreed on

in the way of moving old tracks and laying down new ones. Among other particulars the railroad agreed to convey or cause to be conveyed certain lands in Bolton Street and Whitaker Street, "preserving of course the easement of the said street railway company over said land for its railway purposes." In the last amendment to the contract an extension is agreed to, "and the right to lay down, construct, maintain and operate said railway through said streets as before stated is granted subject to the control and regulation of the said mayor and aldermen, the same as other lines of railway as provided in said contract of November 4th, 1897." It is said that these phrases exempt at least so much of the road as they cover, and that therefore the tax is void as a whole, because it does not appear what proportion of it is attributable to unexempted portions.

This kind of argument seems to assume that the tax is a tax on the right to use the streets and not a tax on the business. But a sufficient answer is that none of the expressions quoted import any exemption from taxation whatever, if it was within the power of the city to grant it. See *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192. We are of opinion that the plaintiff's case fails on every ground.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.